VAN VOLLENHOVEN ON INDONESIAN ADAT LAW

EDITED BY

J.F. HOLLEMAN

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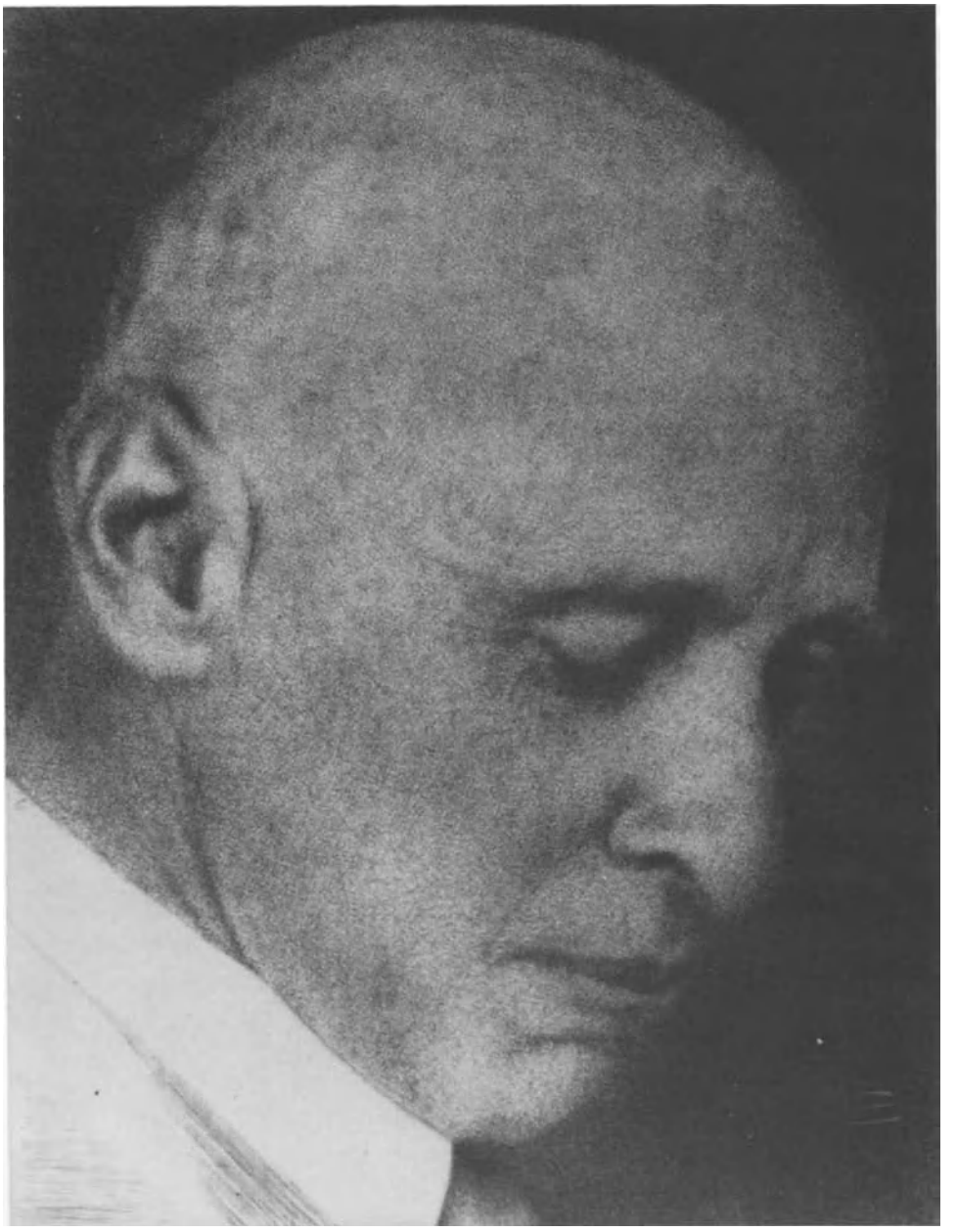

From a press photograph, Batavia 1932

C. van Vollenhoven

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VAN VOLLENHOVEN ON INDONESIAN ADAT LAW

Selections from
HET ADATRECHT VAN NEDERLANDSCH-INDIË
(Volume I, 1918; Volume II, 1931)

edited by
J. F. HOLLEMAN

with an Introduction by
H. W. J. SONIUS

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To the memory of F.D.H. and J.H.A.L.
who sacrificed so much to this venture
but did not live to see the result.

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FOREWORD

I.

The plan to prepare a translated selection of Professor Van Vollenhoven's writings on Indonesian adat law was first seriously mooted in the early 1950s. The motivations for such a venture were clear and compelling. For more than three decades, from the turn of the century until his premature death in 1933, Van Vollenhoven had been the mastermind and driving force behind the first systematic study of the rich variety of indigenous Indonesian law, and the foremost champion of its recognition in the colonial system of the Dutch East Indies. His influence on colonial legal policy had been immense (see *Introduction*, below). His towering scholarship and rare powers of persuasion as a writer and teacher had inspired a whole generation of workers in the field — colonial servants, academics, missionaries and others — whose researches had yielded a vast new adat law literature, all faithfully cast into the conceptual categories and distinctive terminology which Van Vollenhoven had designed to stress the 'oriental' identity of Indonesian law. Yet very little of this rich store of knowledge was accessible to the outside world. Admittedly, in 1948, Hoebel and Schiller had published an English edition of Ter Haar's authoritative 1939 treatise on Indonesian adat law, but of the master's own writings in this field virtually nothing was known to non-Dutch readers, except a French translation (1935) of his brilliant essay on the 'discovery' of adat law (1928) and a few short papers in English and French.

Holland had lost the Dutch East Indies, but could pride itself on a wealth of scholarly studies on every aspect of Indonesian life and culture, which, if translated into a world language, might be of benefit to scholars everywhere. (The Royal Institute for the Tropics in Amsterdam had, in fact, already started with a long-term programme of translating selected Dutch studies on Indonesian culture.) Moreover, there

was evidence that the English version of Ter Haar's book had aroused the interest of foreign scholars in the writings of Van Vollenhoven himself, among them experts on African law like Gluckman and Phillips (letter P. J. Idenburg to J. W. M. van Eysinga, 23/6/52).

Under the aegis of the Leiden Institute of Oriental Studies (*Oostersch Instituut*) a commission was formed to explore the possibilities. Its members included the Leiden professors F. M. van Asbeck, V. E. Korn, R. D. Kollewijn, J. H. A. Logemann (chairman), and Dr. J. Prins — all of whom had studied under Van Vollenhoven.

From the beginning it was realized that only a small selection from Van Vollenhoven's vast oeuvre on adat law could be contemplated, and that even the production of a relatively modest volume would present major problems of translation and editing.

The main problems, as seen by the commission, were two. First, Van Vollenhoven's highly individual style would be difficult to reproduce in English, and in particular the problem of finding suitable English equivalents for the technical terminology he had designed would present a major challenge.

Secondly, Van Vollenhoven had written with an eye to administrative and judicial officers in the Dutch colonial service, and his description and analysis of indigenous institutions and legal concepts were closely interwoven with a critical scrutiny of statutory provisions and administrative practices. However pertinent at the time, many of these were no longer relevant, or were even incomprehensible to English readers not thoroughly acquainted with the complexities of the pre-war legal and administrative system in the Dutch East Indies. Moreover, eschewing footnotes, Van Vollenhoven had put his often very extensive and predominantly Dutch source references in parentheses. In a translated text most of these would needlessly encumber readers who have no Dutch. In short, the preparatory work alone of 'pruning' the selected texts before their translation would demand a very considerable scholarly effort and amount of time.

The commission thought it wise to invite Dr. A. Phillips (then at the London School of Economics) as an external adviser. Himself no reader of Dutch, Phillips welcomed the project as likely to stimulate the growing numbers of Anglo-American scholars in the field of customary law, but in view of Van Vollenhoven's stylistic and terminological idiosyncracies he stressed that the production of a 'good and easily readable English text' was of first importance if the work was to make any impression at all. Furthermore, the work would need an

authoritative introductory essay outlining the historical significance of Van Vollenhoven's work, showing its background in the complex administrative and legal system of the Dutch East Indies, the trends in Dutch colonial legal and economic policy, and the development of adat law scholarship from the early 1900s onwards.

A further difficulty, never fully appreciated by the commission, was that its own persistent striving for near-perfection was to prove a major obstacle to the satisfactory completion of the work within a reasonable time.

My father, F. D. Holleman, was invited to write the Introduction and to prepare the Van Vollenhoven texts for translation. He had been a student of Van Vollenhoven, and his successor to the Leiden chair of Adat Law between 1934 and 1939, but had since returned to his native South Africa, where he taught at Stellenbosch University. His academic commitments made him decline the first task, but he agreed to take care of the second when he was told that his son was being asked to make the translation. (Phillips, having read some of my publications on African customary law, conceded that my command of English, though 'not perfect' and probably in need of some expert editing, might be good enough to turn out a translation not unworthy of Van Vollenhoven's scholarship. My familiarity with his work and my training in this field of study were considered distinct advantages.)

I accepted the task after much hesitation. I had more than enough work in hand at the time, which even prevented me from working up my own field material the publication of which was overdue. Also I had little experience as a translator, and though much less familiar with Van Vollenhoven's writings than the commission seemed to believe, I had read enough of his work to have some idea of the formidable difficulties I would face. The selection was to be taken entirely from the monumental *Adatrecht van Nederlandsch-Indië,* a work in which, more than in most of Van Vollenhoven's writings, the force of his pure if slightly archaic language was likely to be lost through his frequent use of a highly involved syntax, utterly different from English usage. Though written in my mother-tongue I had found the *Adatrecht* no easy reading, and the portent of some passages had escaped me because I lacked the inside knowledge of the Dutch colonial system, and of its problems and practices, which the learned author evidently assumed his readers would have.

On the other hand, knowing the veneration with which Van Vollenhoven was regarded in Dutch academic circles (I, too, deeply admired

him) it was difficult to turn down an urgent appeal from people I had known and respected in my youth when they were my father's colleagues in the Law School at Batavia (now Jakarta).

To be entrusted with a task which they considered to be of such importance academically and a fitting tribute to one of the greatest scholars Dutch legal science had known, was an honour to which I was not insensitive. But the main reason why I agreed to take on the job (its remuneration would be a mere pittance) was the prospect of close collaboration with my father in a vocational fellowship which meant much to both of us, even though we would have to communicate by letter between Bulawayo, where I lived at the time, and Stellenbosch, some 1500 miles away.

We bravely set about our task in January, 1954. The commission in Holland expressed the hope that the translation would be completed in about two years, which I considered wildly optimistic for I had warned Logemann that I doubted if I could spare it more than a few hours in the evening. But even in my most pessimistic moments I could not foresee that twenty-five years later I would still be burdened with it.

II.

The selection made by Logemann's commission comprised these sections from Vols. I and II of Van Vollenhoven's *Adatrecht* (cf. the table of contents in *Annex B*):

First Part,	ch. I:	Adat, Adat Law, Native Law	10 pp.
	ch. II:	The Elements of Adat Law	25 pp.
	ch. IV:	The Study of Adat Law	37 pp.
Second Part,	ch. I (2):	Aceh	78 pp.
	(18):	Central and East Java and Madura	150 pp.
Third Part,	ch. I-III:	The Maintenance of Adat Law	172 pp.
Fourth Part,	ch. VII:	Conflict of Private Laws	15 pp.
		Total:	487 pp.

This was much more than had been initially contemplated, but the excision of passages thought to be of no interest to English readers was expected to reduce the number of pages considerably.

As the first three sections were part of Van Vollenhoven's methodological 'orientation', the commission agreed to my request to add the short section on 'Law Areas' (Second Part, chapter I,1), which I con-

sidered to be indispensable to the understanding of his methodology.

Aceh (composed in 1908-9) was selected because it was the first of Van Vollenhoven's systematic 'area' studies, cast under the headings and in the terms which were to become standard practice in virtually all later adat law studies. Central and East Java and Madura (1917) represented what many considered to be his most accomplished exposition of a coherent body of living adat law in an area widely believed to be virtually devoid of it after centuries of foreign occupation. The chapters on the maintenance of adat law (1926) were an obvious choice, being not only a masterly treatise on the judicial process and various forms of adat law observance, but an invaluable guide to government courts on the essential nature of indigenous justice.

The short chapter on the internal conflict of laws (1931) did little more than annotate problems met with in legal commerce between parties of different legal (sub-)cultures, a subject sufficiently important to form a separate discipline, *Intergentiel Recht,* in the Batavia Law School (where its most prominent exponent was R. D. Kollewijn, later at Leiden and a member at the commission). This chapter was dropped from the selection many years later, when after Logemann's death the whole project was reviewed and some changes were made (see below).

The Introduction — the commission envisaged a comprehensive scholarly essay of some hundred pages — was to be written by Prof. C. T. Bertling of Amsterdam, also a student of Van Vollenhoven (Korn, my father's successor at Leiden and an obvious first choice, had declined to undertake what he rightly feared to be a most arduous task). To my dismay I heard that I was to translate the Introduction, too, in order 'to preserve a certain unity of style'. I shall return to its fate later.

It was agreed that the translation would be posted to Holland in instalments as the work progressed, each batch of 20-40 typewritten pages going to each member of the commission in turn to be scrutinized, as well as to Phillips in England, who had generously agreed to supervise my exercise of the King's English. All comments would then be sent back to Africa for our consideration.

Between Father and me a similar shuttle service operated, and my files show that every part of the translation travelled at least four times in both directions across the Limpopo River in a lively exchange of comments and suggested improvements before being finally retyped and sent off to Holland, where we hoped it would meet with the commission's (and Phillips') approval. The search for suitable technical terminology posed special problems often requiring a good deal of con-

sultation and research. Van Vollenhoven had designed a whole new range of legal terminology in order to avoid the misleading habit among most jurisprudents of too readily employing western juridical terms for oriental conceptions and institutions which superficially resembled those of the west. Sometimes his inventions had been inspired by early Dutch or biblical usage, but as often as not they were products of his imaginative linguistic craftmanship. Where a literal translation would be un-English or incomprehensible, we had to go back to the Indonesian institution or concept itself in order to think up an appropriate English name for it (my excursions into old Anglo-Saxon law were less fruitful than I had hoped they might be).

Initial progress was slow, despite the fact that for the first four months I was unemployed and could therefore devote all my time to the translation. Trying to reproduce (as the commission dearly hoped) Van Vollenhoven's characteristic style and often striking idiom in the 'good and easily readable English' on which Phillips had insisted, proved to be far more difficult than I had feared it would be, and it took me several weeks to make some headway. (The brief and deceptively simple opening sentence alone was completely redrafted seven times and even then failed to satisfy us; it was not until the final revision, many years later, that Maddock and I hit upon the right formulation.)

But three months later (April 1954) we were able to despatch the first few chapters, some forty pages of typescript, with which we felt reasonably satisfied. The commission found it (letter Kollewijn, 11/5/54) 'a most encouraging start', but felt doubtful about some of our terms and the accuracy of some passages. Phillips expressed reservations about the quality of the English: 'good but not perfect', clearly a euphemism, for he urged that it be thoroughly purified by a competent English editor.

We had, of course, expected criticism, but when we received the manuscript back, several months later, it was absolutely littered with suggested changes which the commisioners and Phillips had scribbled on it, and we had to grit our teeth. It was not only that revision as indicated would require weeks of extra work and lengthy correspondence to sort out the many technical points on which we differed with the commission. We also realized that it would be impossible for us to achieve the 'accuracy' which the commission evidently wanted of us with regard to Van Vollenhoven's idiom, while producing a text which would satisfy an English purist.

An even more nagging problem was the fact that I was now fully employed and that my regular work (first in Salisbury, then in Bulawayo) demanded so much of my time and energy that I could not spare more than six to ten hours a week for the translation, and even that far from regularly. Production slowed down to a trickle, which worried us as much as it did the commission, but neither side was yet prepared to acknowledge defeat. By the time I moved to Durban (1957) to take charge of the University of Natal's Institute for Social Research, we had completed Aceh and made a start with Java. Knowing that my new employment would require me to be away from home for weeks on end, I wrote to Father and Logemann suggesting that the time had come to face realities and to make other arrangements. But they urged me to go on, hoping for a favourable turn of the tide. By the end of the year and about half-away through the Java chapter, I learned that my father was incurably ill and that our splendid partnership would soon end. I wrote to Logemann that I had to give up, and I was grateful for the understanding he showed. After Father's death in January 1958, I sent Logemann whatever I still had in draft translation. It included a section I had found on my father's desk. His careful emendations had stopped at mid-page . . .

III.

When I accepted the Leiden chair of African studies in 1963, Logemann had already retired from academic life. In spite of our close relationship, — it was he who had persuaded me to come to Leiden — he was reticent about the state of the Van Vollenhoven translation. But I understood from him that professional translators had been working on it from time to time under his supervision, but that progress had been painfully slow and that the work was far from completion.

My translation (after some revision) had been retained, except for the unfinished Java chapter. He admitted that he had much underrated the technical difficulties involved, but that working with professional translators posed problems of an even more intractable kind ('like prima donnas, they can be the devil to play with').

Despite his disheartening experience, he was still determined to see it through, 'provided of course, that I live long enough'.

He did not.

After his death (late 1969) I 'inherited' the Van Vollenhoven material 'to dispose of as you think fit', a stack of carefully ordered files

reaching two feet high, containing everything done so far, including a vast amount of correspondence and minutes reflecting seventeen years of frustrating efforts. It made depressing reading.

I found Bertling's long Introduction. Its Dutch original, revised several times at Logemann's insistence, had been completed in October 1957, and translated professionally in 1959. But in 1961, after the Van Vollenhoven project had been transferred to the Royal Institute for the Tropics in Amsterdam to form part of its series of translated Dutch studies on Indonesia, the Institute's editorial committee decided, with Logemann's consent, to drop the whole Introduction 'for financial reasons' in favour of a brief Foreword (not yet written) — a poor reward for more than three years of diligent effort.

Doubts about the quality of my own translation appeared to have been more persistent than Logemann had ever let on to my father and me. The manuscript had finally been submitted to a reputable American adat law scholar for his 'frank opinion'. He found it to be 'good and faithful', requiring only a little expert editing to make it fully acceptable. (Reading my own text again after an interval of more than twelve years, I thought that he had been too kind, and that it would need more drastic treatment.)

I was shocked to discover that, apart from Bertling's ill fated introductory essay, no more than 25 'approved' pages of Van Vollenhoven text had been added to my own translation — a pitiful yield for a ten-year period.

The correspondence files revealed the whole sad story, which need not be told here in all its detail. Suffice it to say that, after I had given up the work, the commission believed that quicker and better results would be achieved by engaging fully qualified, English-born translators with experience of scientific writings. But such people proved to be extremely rare, and usually freelancers mainly dependent for their livelihood on assignments from regular 'customers' (publishers, magazine editors) whose deadlines had to be met in order to keep their custom. The Van Vollenhoven project was subsidized on the basis of a fixed rate per word. This may have been sufficient remuneration for a reasonably smoothly running translation process. It was hopelessly inadequate for a work which not only demanded much more time and concentrated study than a non-salaried man could afford to give it, but which was also burdened by the same wearisome repetition of scrutiny and revision by exacting Dutch adat law scholars with insufficient command of English which had already been irksome to my father

and me many years earlier, but which sooner or later proved to be intolerable to hard-pressed and highly sensitive professional translators.

The results were disastrous. The first engagement (1960) of nearly twelve months yielded 25 approved pages of Van Vollenhoven text. The second and last engagement — six years later! — though lasting even longer, did not produce a single page that fully satisfied the editors, but it left the files full of letters which spoke only too clearly of an exhausting battle between a fast ageing but still courteously persisting, retired academic, and an increasingly recalcitrant, if self-opiniated, member of the translating profession.

IV.

The decision to resume the project, though in a somewhat revised form, was taken around the middle of 1971 by an *ad hoc* committee of the (now defunct) Adat Law Foundation in Leiden. Besides myself as convener, its members were:
Professor J. Prins of the University of Utrecht, the only surviving member of the original commission;
Mr. H. W. J. Sonius, an old student of Van Vollenhoven with a long and distinguished career in the pre-war Dutch East Indies administration;
Professor G. van den Steenhoven of the University of Nijmegen, who was doing much to restore a working relationship with Indonesian adat law scholars, which had been badly disrupted by the war and Indonesia's independence.

Needless to say, it was a difficult decision, based more on good faith and a feeling that a debt of honour had to be discharged, than on sober reckoning. Frankly, I dreaded it, for I estimated that about two-thirds of the work had yet to be done. Having read through my own (professionally edited) part of the manuscript and scrutinized the other approved pages, I thought the first still to need thorough revision and the second to be so full of inaccuracies as to need re-doing. Moreover, I knew that, no matter how much assistance and moral support my colleagues gave me, mine would unavoidably be the main burden. For I now held the chair that had been Van Vollenhoven's and my father's, a chair saved mainly by Logemann's efforts when, after the dismantling of the East Indies colonial administration and the retirement of Korn, there seemed little incentive for the Leiden law faculty to

retain it. So it was not only to Van Vollenhoven's memory that a debt of honour had to be paid.

The new editorial committee made some changes in the plan of the book. We re-adopted Arthur Phillips's idea of an introductory essay as an essential framework for English readers unfamiliar with the vicissitudes of Dutch colonial policy and the complex legal and administrative system in the East Indies. But the essay needed to be far more concise than Bertling's had been; and it had to include a section on problems of legal pluralism to replace Van Vollenhoven's short and rather fragmented chapter on the internal conflict of laws, which we had decided to drop. Sonius, who was now retired, was eminently qualified for this difficult task.

We added the brief area study of Minangkabau to the selection, mainly because its divergent social structure and its peculiarities of family property had so intrigued Van Vollenhoven (the data then available were sparce) that he deviated from his normal order of headings.

On the other hand, we drastically cut the long chapter on Java and Madura and the even longer section on the maintenance of adat law. Thus space was made for what we hoped would be an interesting comparison of colonial and post-colonial attitudes to adat law. For this purpose we meant to choose two of Van Vollenhoven's most outspoken essays on legal policy (including the famous 'No Lawyers' Law for the Indonesian' of 1905), and we invited a number of prominent Indonesian legal scholars to evaluate his work and views in the light of Indonesia's current policy and of the conceptions that were now held of the place of adat law in the national legal system. Much to our regret, we later had to abandon this promising venture because of editorial difficulties.

We also agreed on a simpler working method. Sonius would be largely responsible for excising 'redundancies' from Van Vollenhoven's text; I would then annotate every page with detailed directions for the translator, the supervision and final judgement of whose work was to be entirely my responsibility. We thus hoped to avoid the paralysing rounds of scrutiny by individual committee members all striving for perfection. Although I was to be free to consult my colleagues when I needed their technical advice, only the final draft of the translation as passed by me would be submitted to them, and then only for essential emendations.

The next step was to find a suitable translator. This was crucially

important, because after Logemann's experience I would not work with professionals. We wanted a native speaker of English with a good ear for language, preferably with an academic background, with a sufficient grasp of Dutch to understand Van Vollenhoven's idiom (helped, where necessary, by my annotations). Translating experience would be useful, but more important was the will to see the long and difficult job through in a spirit of give and take. Logemann, unsure of his English, had conceded to the professionals their demand for the final say in 'all matters of English usage', with the commission being left to rule only on 'technical terminology' and on faulty interpretations of Van Vollenhoven's text. This had led to endless debates and even to such absurdities as the refusal of one translator to use the term 'adat law' because the adjective was 'un-English'. (Logemann, who must have been very tired, finally compromised by accepting 'customary law', which Van Vollenhoven himself had occasionally used.) What Logemann never fully realized — and these translators apparently would not admit — was that the linguistic and technical problems posed by this translation were so closely interwoven as to make it well-nigh impossible to draw a clear line between the translator's and the editor's respective fields of competence and final responsibility. Willing though I was to respect a translator's craftmanship and to welcome his inventiveness, I would not surrender responsibility for the final product.

Late in 1971, on the recommendation of one of my Leiden colleagues, we engaged Mrs Rachel Kalis as translator. A young English-born housewife, academically qualified in anthropology and married to a lawyer, she had some experience of translating Dutch scholarly writings. Our long tale of past frustrations did not discourage her, nor did the many corrections which I had seen fit to make in her test-translation of a piece of Van Vollenhoven as a fair warning of what she could expect. She undertook the task on my terms, and she saw it through in a fine spirit of co-operation which did not flag in spite of her returning to England, raising a family, and moving house several times. I am deeply grateful for her perseverance and loyalty.

When the translation was resumed, early in 1972, some of us hoped that it might be completed in 1974, the centenary of Van Vollenhoven's birth, but this, too, was over-optimistic. What with domestic responsibilities on one side of the English Channel and academic commitments on the other, the translation remained what it had always been: a demanding and much interrupted spare-time occupation. Not until

spring, 1976, was the main task at an end, though I still had to revise my earlier translation of the first five chapters, and to try to bring greater unity of style into the work as a whole.

In the meantime, Sonius' Introduction, too, had been completed (and translated by Mrs Kalis), a scholarly essay, which unfortunately was too long for us. At his request, the Dutch version was therefore published separately (Institute of Folk Law, University of Nijmegen, 1976), an abbreviated and slightly revised English version being made for the present volume.

Overwork and ill-health prevented my getting down to a general revision until I took final leave in January, 1979. I had prepared myself for a long and solitary effort. I was, instead, presented with the most stimulating collaborator I could have wished for: Kenneth Maddock of MacQuarie University, New South Wales. A trained lawyer and anthropologist, actively interested in customary law (aboriginal land rights, Northern Territory), he had become familiar with Van Vollenhoven's and other Dutch writings on Indonesian adat law during two years of study leave in Holland. Maddock brought to the translation what it needed most at this late stage: a fresh, inventive mind, a keen eye for essentials and, above all, a sense of fun in spotting simple solutions to seemingly intractable problems of language. The three days we spent together going over the first fifteen pages (which I had already revised) changed a dreary process of correction into an exhilarating contest in English marksmanship. It resulted in the kind of revision I had hoped for but could never have done alone. The new spirit prevailed also after he had left for Australia and we had to continue by post, covering page after typewritten page with scribbled corrections and comments. When we reached Mrs Kalis' translation, she sportingly joined in the game.

Fifteen months later (spring, 1980) we had reached the end of the long trail.

V.

The two hefty volumes of Van Vollenhoven's *Adatrecht* were first published in fourteen instalments between 1906 and 1931 (see publishing schedules, *Annex B*). Barring any further mishaps, this selection — barely one-sixth of the original — will appear almost exactly fifty years after the last, eagerly awaited, instalment, which moved the editors of a leading law journal to write:

> 'Our humble tribute to the scholar who laboured for twenty-five years to raise this monument. To-day a source of reference for the practitioner, it will stand as a model of scholarship for many years to come' (ITR, 134/4, 1931).

Unlike Ter Haar's more accessible work, Van Vollenhoven's *Adatrecht* is no longer a work of reference in present-day Indonesia — in fact, very few university libraries there have a copy. Even in the Netherlands, only a handful of scholars can claim to have read it. It has come to be looked upon as a colonial relic, 'relevant only to historians'.

The commission of eminent scholars who decided that a choice of Van Vollenhoven should be published were of a different view. All of them had many years of administrative or judicial experience in the East Indies, which had given them the opportunity to gain a deeper understanding of adat law, not merely for the sake of scholarship, but for the higher purpose stated by Van Vollenhoven: 'our loftiest aim is the creation, not on paper but in reality, of a good administration of justice and a good system of government . . . two things that cannot be attained without a solid knowledge of popular law and popular conceptions' (1909:90). They hoped that this publication would foster the same motivating spirit among other workers in the fields of customary law and of legal development in culturally plural societies. The colonial era was then fast approaching its end, and many newly independent governments would soon face the same problem of how to accommodate the diversity of living popular law with received western law in a coherent system of comprehensible justice for all. The Dutch experience might still hold a lesson for others.

Now, more than a quarter of a century later, scores of new states are pursuing policies of legal reform which are often more radical and western-orientated than Van Vollenhoven and his followers would have considered advisable. It may be argued — as Sonius points out in his Introduction — that Van Vollenhoven was being too conservative when he fiercely defended traditional values and institutions. And, indeed, anyone with more recent experience of the grass-roots of law in these indigenous societies can testify that much is no longer traditional; but also — and this point is crucial — that these changes were seldom intended by legal reformers. Mostly they have been popular responses to the compulsion of social and economic change, giving rise to new trends and developments in the living law of which government courts are all too often ignorant. Add the declining authority of traditional local tribunals (if recognized at all), and the certainty of law for com-

mon folk becomes highly doubtful. In fact, Van Vollenhoven's ideals of good government and of a system of justice comprehensible to all, based on solid knowledge of popular law and popular conceptions, is more remote than ever. Therefore, the greater the need for systematically applied and constructively critical scholarship, founded on patient investigation and close observation of the realities of legal life.

For these reasons, a choice of Van Vollenhoven's seminal work may still be of more than historical value.

Although much of his descriptive material is obviously dated (as, indeed, it tended to be when he was writing), his treatment of it still stands out for his perceptive interpretation of the basic legal conceptions, relationships and institutions which operate to this day at the grass-roots of Indonesian legal life. This is the more remarkable because Van Vollenhoven never did field-work, but this lack was more than compensated by his vast erudition, which made him impatient with western juristic dogmatism and eager to search for what he once called 'the living face of law'. The East Indies archipelago became a revelation to him: a 'jumble' in the eyes of a codist, but an 'inexhaustible source of instruction' to those 'whose desire for knowledge and explanation of the living law on earth is inspired by the very diversity of its past and present manifestations'.

There is little explicit theory in Van Vollenhoven's work — the nearest he comes to a definition of law is in a parenthetical subordinate clause in the opening sentence of his second chapter — but he has an unusually wide and critical sense of classification, which leads him not only to organize conceptual categories into coherent systems of law within homogeneous 'law areas', but also to the notion of a broader geographical framework for a comparative, transcultural study of law which extends far beyond the Indonesian archipelago.

The principal tenets of Van Vollenhoven's approach are discussed in the Introduction, and little needs to be added here.

The first four chapters unfold the basic pattern of his method, including the historical aspect which is essential to all his work.

The next three chapters apply this method to different law areas: systematic 'inventories' of substantive law and legal practice based on indigenous conceptions and categories which Van Vollenhoven distilled from the materials available to him. Only the first of these area studies is reproduced here virtually in full; the other two have been abridged (compare the headings with those listed in the Introduction).

Chapter VIII, on the maintenance and growth of adat law, contains

three sections which originally appeared as separate chapters in the second volume. They were written in 1926, some eight years after the completion of his area studies, when Van Vollenhoven was able to draw on fresh field materials. The result was an analysis of the ways of popular law observance and judicial intervention which for its comprehensiveness and perspicacity not only far excelled anything similar done before, but even to-day must rank as a rare feat of interpretative scholarship. The second section establishes 'attested law observance' — or 'preventive law care', to use Logemann's term — as a distinctive and vital level in the maintenance of law, between voluntary observance and judicial sanction, and throws new light on the role of authoritative 'witnesses' to important transactions in indigenous legal commerce. The section on the role of the courts (much shortened here) is largely based on the practice of those tribunals which were later officially recognized as 'village justice'. Van Vollenhoven not only makes a penetrating analysis of what he regarded as the essence of an effective indigenous administration of justice, but provides an authoritative guide for government courts entrusted with applying adat law in the colonial system.

We decided to add the last, very brief, chapter of his *Adatrecht* as an 'epilogue' to our choice. In the original, it concludes a series of chapters which Van Vollenhoven had devoted to the critical survey of successive legal policies and experiments during more than three centuries of Dutch colonial rule, in order to see what lessons might be drawn for the future. The course of adat law had always been influenced by two contending forces: its own 'germinating power', and the impact of foreign influences and demands. These forces would, in future, diverge even more sharply, and the fate of adat law would depend more than ever before on the people themselves, on their will and striving to preserve and adapt their rich cultural heritage. The epilogue is not only a hopeful appeal to Indonesian cultural pride, but also the final testimony of a great western scholar's respect for the virtues of another culture.

A choice like this, concentrated almost entirely on the adat law of some of the *indigenous* peoples of Indonesia, must inevitably fail to reveal the comprehensiveness of Van Vollenhoven's *Adatrecht*. We have had to omit, for instance, the separate sections on the popular law of so-called foreign orientals — Chinese, Indians, Arabs — in the archipelago, and the chapters on the religious — pagan, Hindu, Mos-

lem, Christian — elements in adat law. Likewise, we had to leave out the major treatise on the place which all this popular law assumes in the legal system of the East Indies. For an appreciation of the vast scope and methodical build-up of the *Adatrecht,* readers are therefore referred to the translated table of contents in *Annex B,* which also lists the titles of his essays on adat law as collected in the third volume of 1933, and of his other publications in this field. (It may be mentioned that more than one-half of his massive oeuvre was in other fields of scholarship.)

In 1910, the newly created Commissions for Adat Law at The Hague and Batavia issued a brief 'guide' to field research — believed to be largely composed by Van Vollenhoven. It is reproduced here as *Annex A.* After more than seventy years, it still makes instructive reading.

Leiden J. F. Holleman
January 1981

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This work has taken so long to complete that many who were involved in it are no longer living. May it suffice to say that they, together with all those named in the Foreword, deserve praise and gratitude for their selfless efforts.

Among those not yet mentioned, whose assistance has been especially valuable when preparing the manuscript for the press, I am greatly indebted to:
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But most of all I am indebted to my wife, for her unfailing support at times when I most needed it.

J. F. H.

EDITORIAL NOTES

Many passages from the original text have been omitted because they were considered to be of little interest to English readers. They range from a few words or references to whole paragraphs or even pages. Short omissions are marked by (—), substantial omissions by (— —).

Those wishing to check Van Vollenhoven's own text will find the original page numbers in square brackets on the left of the present text. (Note, however, that in chapters VIII and IX these numbers refer to Volume II of the original work.)

All editorial matter in the text, notes and annexes is placed in square brackets: [ ] or [- Ed.].

There are no footnotes in the original, and even the most extensive source references, as well as much explanatory detail, are included in parentheses. This has often resulted in sentences of such enormous length and syntactic complexity that it was impossible to render them intact into acceptable English. To overcome this problem, references have been abbreviated in accordance with modern usage. They have, however, been kept in parentheses only where they appear one or two at a time; otherwise they are transferred to notes at the end of the book. For the same reason, some other unwieldy parenthetical passages, if worth retaining, had to be accommodated in notes.

Van Vollenhoven made copious use of vernacular terms, but for their interpretation had to rely on sources which, today, prove to be not always reliable. Although obvious mistakes have been corrected in the text, readers with linguistic interests are advised to consult the dictionaries mentioned in the Bibliography.

Orthography

With a few exceptions, the present-day official spelling of Indonesian words and names has been adopted — a departure from Van Vollenhoven's text, which follows the pre-war spelling. The exceptions mostly concern the names of pre-war Indonesian authors and publications. In conformity with accepted usage these are cited in their original spelling.

The old names of islands like Borneo (now Kalimantan) and Celebes (Sulawesi) have been retained, as well as those of administrative divisions in the colonial system; the spelling of place names, however, has been modernized.

The following table lists some changes in spelling and provides a guide to their pronunciation:

Indonesian	*Dutch*	*Pronunciation*
c	*tj*	as ch in 'choose'
ng	*ng*	as ng in 'singer'
ngg	*ngg*	as ng in 'finger'
ö	*eu*	as *eu* in French '*deux*'
u	*oe*	as u in 'full'
j	*dj*	as j and dg in 'judge'
y	*j*	as y in 'young'

Finally, the special symbol used by Van Vollenhoven for the glottal stop ' (*hamza*) at the end of a word in some vernacular languages, has been replaced by *k* (e.g. *hak,* as in Indonesian to-day); likewise, his use of the symbol *å* in Javanese words (pronounced as *a* in 'war') has been replaced by *a* (e.g. *désa*).

The word *adat* (custom), of Arabic origin, has very wide currency in Indonesia, though its pronunciation may differ considerably from one place to another (see, e.g. page 4, below). Because it is a key-word in the present study, not only its standard spelling has been maintained, but it is not italicized, except in vernacular compounds and expressions.

Abbreviations

AB — *Adatrechtbundels* (periodically published volumes of systematically arranged materials on adat law, 1910-1955).

ABW — *Algemeene Bepalingen van Wetgeving voor Nederlandsch-Indië* (General statutory provisions for the N.I. — Royal Decree 30/4/1847).

BKI — *Bijdragen tot de Taal-, Land- en Volkenkunde (van Nederlandsch-Indië) van het Koninklijk Instituut voor (de) Taal-, Land- en Volkenkunde (van Nederlandsch-Indië)* (Journal of the Royal Institute of Linguistics and Anthropology).

Bb. — *Bijblad op het Staatsblad van Nederlandsch-Indië* (Annexes — official circulars, information, etc. — to ISb.).

Bl. — *Bijlagen* (Annexes — reports, etc. — to *Handelingen*).

Enc. N.I.	*Encyclopaedie van Nederlandsch-Indië* (1st ed. 1896-1905, 4 vols.; 2nd ed. 1917-21; suppl. 1927, 1932, 1935, 1939).
Eindresumé (Er.)	(Final report agrarian inquiry in Java and Madura, vol. I (1876), vol. II (1880), vol. III (1896)).
Handelingen	— *der Staten-Generaal* (Parliamentary proceedings — the Dutch 'Hansard').
HNIJ	*Handelingen der Nederlandsch-Indische Juristenvereeniging* (Proceedings N.I. Society of Jurists).
IG	*De Indische Gids* (journal).
IR	*Inlandsch Reglement* (Police regulations and civil procedure for natives and foreign orientals in Java and Madura — Royal Decree 5/4/1848).
IS	*Indische Staatsregeling* (1925 Constitution of the N.I.).
ISb.	*Staatsblad van Nederlandsch-Indië* (Government Gazette of the N.I.).
ITR	*Indisch Tijdschrift van het Recht* (Indies law journal, successor to RNI).
IWR	*Indisch Weekblad van het Regt (Indies law weekly).*
KAW	*Mededelingen der Koninklijke Akademie van Wetenschappen* (Communications of the Royal Academy of Sciences).
KS	*Koloniale Studiën* (journal).
KT	*Koloniaal Tijdschrift* (journal).
KW	*Koloniaal Weekblad* (journal).
MbZg	*Maandberichten van het Nederlandsch Zendelinggenootschap* (Monthly of the Netherlands Protestant Missionary Society).
MZg	*Mededeelingen van wege het Nederlandsch Zendelinggenootschap* (Communications of the Netherlands Protestant Missionary Society).
N.I.	The Netherlands (East) Indies.
NRC	*Nieuwe Rotterdamsche Courant* (daily newspaper).
PA	*Pandecten van het Adatrecht* (Pandects of adat law), 10 vols., 1914-1936.

Plakaatboek *Nederlandsch-Indisch Plakaatboek 1602-1811,* ed. by J. A. van der Chijs, 17 vols., 1885-1900 (series of collected Netherlands Indies official documents, 1602-1811).

RM *Rechtsgeleerd Magazijn* (law journal).

RNI *Het Regt in Nederlandsch-Indië* (law journal, 1849-1914, predecessor of ITR).

RO *Reglement Rechterlijke Organisatie . . . in Nederlandsch-Indië* (judicial regulations for the N.I. — Royal Decree 30/4/1847).

Regeringsreglement (Rr.) (1854 Constitution of the N.I.; superseded in 1925 by IS).

TAG *Tijdschrift van het Koninklijk Nederlandsch Aardrijkskundig Genootschap* (Journal of the Royal Netherlands Geographic Society).

TBB *Tijdschrift voor het Binnenlandsch Bestuur* (Colonial administration journal).

TBG *Tijdschrift voor Indische Taal-, Land- en Volkenkunde van het Koninklijk Bataviaasch Genootschap* (Journal of the Royal Batavian Society).

TNI *Tijdschrift voor Nederlandsch-Indië* (journal).

VBG *Verhandelingen van het Bataviaasch Genootschap* (publications of the Batavian Society).

VG *Verspreide Geschriften* (Van Vollenhoven's miscellaneous writings/papers).

VIG *Verslagen van het Indisch Genootschap* (proceedings of the Indies Society).

VKAW *Verslagen/Verhandelingen der Koninklijke Akademie van Wetenschappen* (proceedings/publications of the Royal Academy of Sciences).

VKI *Verhandelingen van het Koninklijk Instituut voor Taal-, Land- en Volkenkunde* (monograph series of the Royal Institute of Linguistics and Anthropology).

WA *Wet en Adat* (journal, 1896-98).

WR *Weekblad van het Recht* (law weekly).

ZVR *Zeitschrift für vergleichende Rechtswissenschaft* (comparative law journal).

INTRODUCTION

I. *A jurist at the turn of the tide of Dutch colonial policy*

When Cornelis van Vollenhoven, newly appointed as Professor of Constitutional and Administrative Law of the Dutch Overseas Territories and of the Adat Law of the Dutch East Indies, gave his inaugural lecture on 2 October 1901, his proposed 'exact jurisprudence' had yet to meet the crucial test of the legal problems created by a changing colonial policy. Rule by a mercantile company, the United East Indies Company, had been followed by metropolitan rule by the Dutch government, the main objective of which was to exploit the East Indies through agrarian production for the European market (coffee, tea, indigo, rubber and so on) and development of mineral resources (chiefly tin), an exploitation which was successively carried out through state enterprises, compulsory cultivation by Indonesians, and large private plantations. Now, after long and heated debate both in and outside the Dutch parliament, a fresh principle of administrative policy was proclaimed: that of moral responsibility.

In September 1901, Abraham Kuyper's newly-formed confessional Ministry made the following pledge:

> 'As a Christian State, Holland is obliged to suffuse its entire policy with a conviction of moral responsibility to the peoples of these territories, and in particular to improve the legal position of native Christians and to give more tangible support to the Christian Missions.'

Formulated as a Christian obligation this course of action would later be broadened as part of the 'ethical policy'. It resulted in emancipatory measures, decentralization and incipient democratization of colonial government, though not without engendering opposition from within and without the political arena, and always in the face of a rapidly growing nationalist movement.

In the complex 'Indonesian' society of that time, with eastern and western peoples coexisting but sharply divided by differences in civic

status, there were many economic and cultural conflicts which raised specific problems about the law applicable to each group. Van Vollenhoven did not take refuge from this maelstrom in an ivory tower of scholarship, but threw his personal life and scientific work unreservedly into furthering what he saw as a prerequisite of justice: a respect for and the recognition and where possible the promotion of the indigenous law of the Indonesians, their adat law.

Moreover, on many occasions, he persuasively pleaded in international circles for respect for the law of the peoples of the colonial territories — India, the East Indies, Indo-China, the Philippines and Madagascar. An example was his address to the *Institut Colonial International* in Paris in 1921 on 'La Politique Coloniale par rapport aux us et coutumes indigènes', which ended with these words:

> "Si, dans le sens de ces conclusions, le devoir m'incombait d'indiquer la direction du droit futur de l'Empire de l'Inde, des Indes néerlandaises, de l'Indo-Chine française, des Philippines ou de Madagascar, l'étude de la coutume m'ayant appris à connaître sa valeur et à l'aimer, la tâche serait lourde, mais attrayante et sublime. Quand je connaîtrais tous les codes du monde, quand j'aurais toute sorte de science juridique, — si je n'ai pas ce respect et cet amour de la coutume orientale, je ne suis rien" (I Corinthiens, XIII, 2).[1]

Van Vollenhoven's dedication to Indonesian adat law — which he saw as a 'law clan' (1920) [2] extending beyond the law of the Indonesians of the Dutch East Indies to that of the Malayo-Polynesian peoples of Formosa, the Philippines, Malacca, Indo-China and Madagascar — was no accident, as the following quotation from the Encyclopaedia of the Dutch East Indies shows (VII (1935):1389-90):

'His work for the Indies was not the unintended consequence of a chance inclination; it was inseparable from his philosophy of life and sustained religious faith. His premise was the *societas humana* of Grotius, the unity of the human species ... as proclaimed in the New Testament ..., with every people having its own value and significance, and every human gift and talent the right to develop its own variety. He never tired of preaching that the oriental colonial peoples ... were entitled to our cordial support in their search for self-expression; that westerners had an ethical mission to fulfil, a moral responsibility ..., and had no right to impose their own laws, institutions and ideas. On the contrary, (they) should seek to know and understand the living genius of oriental peoples, and develop it in co-operation with

them, so that they would become aware of it and responsible for it. Grotius' ideal of the unity of nations in a world protected by law was adopted by Van Vollenhoven in his student days, and he never relinquished it.'

Thus when the Minister for the Colonies introduced a bill in the Dutch parliament in 1904 which aimed at unifying the law for *all* inhabitants of Indonesia (Indonesians, Europeans and 'foreign orientals') on the basis of the codified law of Holland, Van Vollenhoven began the battle for the proper recognition of adat law, wich he was to wage until his death in 1933.

Van Vollenhoven was born the youngest of four children on 8 May 1874 in Dordrecht, a town famous for the first meeting of the States-General in Holland in 1572. His father was president of the local District Court. His mother died before he was four, and he lost his taciturn father seven years later. The housekeeper tried to provide motherly care as best she could, and in his high school principal, S. J. Warren, he found a revered mentor.[3]

Perhaps the illustrious history of Dordrecht, for centuries the foremost Dutch town, first inspired in the young Van Vollenhoven his patriotism and interest in questions of right and might, and later stimulated him to think about the colonial and international role of the Netherlands.

In 1891 he began his studies at Leiden in law and oriental languages. It was a period of intense revival of Dutch literature. Inspired by English, French and Greek romantic poetry the so-called *Tachtigers* [4] made beauty the focus of art and life. Van Vollenhoven came under their influence: the melancholy poetess Hélène Swarth, the word-artist Lodewijk van Deyssel, the grand-seigneurial novelist Louis Couperus and the social pioneer Henriette van der Schalk. These literary influences must have contributed to the clear and pure language of his works, and to their characteristically literary form, which sometimes strikes us as stately or old-fashioned.

Among the many people who greatly influenced Van Vollenhoven's thinking, the three who, according to his biographer Henriette de Beaufort, were the most important were the orientalist Ernest Renan (1832-1892), with his studies on early Christianity and his arguments about a future in which religion must give way to science; the philosopher J. P. N. Land (1834-1897), who opened his eyes to the unity in the diversity of sciences and, in particular, in juridical thinking; [5] and

Christiaan Snouck Hurgronje (1857-1936), the expert on Islam and Aceh, and sometime government Adviser on Islamic affairs, who had much contact with Van Vollenhoven and influenced him especially on the subject of colonial policy.

On 13 May 1898 Van Vollenhoven obtained two doctorates: at 3 p.m. in political science; at 4 p.m. in jurisprudence.

After leaving the university, Van Vollenhoven first became private secretary to J. Th. Cremer, the former tobacco planter turned politician, and then a civil servant in the legal division of the Colonial Office. At the age of twenty-seven, (already deeply impressed by the article 'Een Eereschuld', by C. Th. van Deventer, in the influential *De Gids* (1899) on the subject of Holland's 'debt of honour' to the Indies) he was called to his chair at Leiden. His inaugural lecture (1901) on 'Exact Jurisprudence' [6] urged the need for a unified knowledge of positive law and the will gradually to achieve a synthesis ultimately leading to a world community.

Van Vollenhoven's academic career might be divided into two periods according to the work he pursued.[7]

During the first period, from 1901 tot 1918, he completed the first part of his great treatise on Indonesian adat law, *Het Adatrecht van Nederlandsch-Indië,* a vast effort which went hand in hand with his political struggle for the recognition of this law, which he presented as a well-ordered, coherent and self-generating whole.

The second period, from 1918 until his untimely death in 1933, saw his political success, and a deepening and widening of the study of adat law the results of which were set out in the second part of his *Adatrecht* (1931) and covered the adat law of 'foreign orientals' (Chinese, Arabs, Indians) in Indonesia, the religious elements of adat law, its maintenance, and its place in the legal system of the Dutch East Indies, past and present.

In 1933, on the initiative of some of his former students, a collection of his many papers on adat law and allied subjects was published as the complementary third volume of his *Adatrecht.* This volume excluded, however, the four longer studies: *Miskenningen van het Adatrecht* (Misconceptions of Adat Law) (1909), *Een Adatwetboekje voor heel Indië* (A Specimen Code of Indonesian Adat Law) (1910), *De Indonesiër en zijn Grond* (The Indonesian and his Land) (1919), and *De Ontdekking van het Adatrecht* (The Discovery of Adat Law) (1928).

He visited Indonesia only twice: in 1907, when he became convinced of the importance of the indigenous system of justice for the preservation and growth of adat law; and in 1932, shortly before his death.

The impression which Van Deventer made on Van Vollenhoven has already been mentioned. Born in Dordrecht, like Van Vollenhoven, Van Deventer obtained his Leiden doctorate with a thesis on the constitutional status of the Dutch colonies. Then he went to the East Indies, where he entered the government judicial service before setting up practice as a barrister at Semarang. He returned to Holland in 1897, where his *De Gids* article of 1899 made him a public figure.

His Indonesian evidence enabled him to expose more clearly than ever before — in opposition to unduly favourable reports on the colony — how morally indefensible the policy of the so-called *batige saldi* (net profits) really was. Although confirming what others had already said, Van Deventer's words struck home, because of his careful calculation that Holland had unjustly extracted a profit of 187 million guilders (excluding interest) from the Indies between 1867 and 1877. He cogently argued that restitution in social welfare had to be made if the Indies were to be saved from economic and social disaster.

He was the co-author of an equally revealing study on the economic situation of the people in Java and Madura, commissioned by the Minister for the Colonies and published in 1904. He became a Member of the Dutch Parliament, serving first in the Lower and then in the Upper Chamber. He revisited Indonesia, writing several more articles stressing the need for a policy in which not material gain but the welfare of the people should be paramount. Thus he initiated what became known as the 'ethical policy'. He died in 1915.

In a tribute written in 1926,[8] Van Vollenhoven admired Van Deventer's 'honest, warm and courageous search for beauty, his love of action and, much more important, his love of people and faith in mankind'. But this did not prevent him disagreeing with what Van Deventer 'advocated or initiated as the most enlightened form of statesmanship' in the field of adat law policy: that it should be largely unified and westernized.

The East Indies Company had left the autochthonous law of the Indonesians largely untouched, but by the end of the 19th century the idea was coming to the fore that Dutch civilizing influence must lead to westernization of the law. In 1904, Idenburg, the Minister for the

Colonies, introduced a bill which would make it possible to codify the substantive private law for *all* population groups in Indonesia on the basis of the Dutch Civil Code, though allowing for exceptions such as family and inheritance law for Moslems and some aspects of agrarian law.

Van Deventer supported this bill in his *De Gids* article of 1905 [9] on 'Law reform in the Indies', in which he quoted Macaulay: 'Uniformity when you can have it; diversity when you must have it, but in all cases certainty'. Although the 'intrinsic nature of things' might necessitate legal diversity, such diversity was in his opinion not desirable.

In the same year Van Vollenhoven published in *De XXste Eeuw* a sharp criticism of the bill, under the title 'No Lawyers' Law for the Indonesian'.[10] He characterized the goverment's aim — 'a general law for all'; a 'standard law, as far as possible in accord with the existing laws of Holland' — as 'lawyers' law', as Roman Law had been in relation to early Dutch law; a dominating European law under which all that was still indigenous law or a separate law of foreign orientals would be submerged. In a detailed argument he showed that the 'kaleidoscopic' Indonesian legal situation did not lend itself to such objectives. The Idenburg bill, considerably modified in favour of indigenous law through an amendment by Van Idsinga, was gazetted in 1906 but never put into operation. The struggle for adat law continued.

In 1909 Van Vollenhoven published his 'Misconceptions of Adat Law'. Under the biblical text, 'But mine own vineyard have I not kept',* he discussed the 'indigenous municipalities', their rights over virgin and cultivated land, the nature and systems of adat law, and the disputed adat law of Java. The essence of these misconceptions was that the courts assumed the non-existence of adat law where it did in fact exist, and used distinctions from western (Roman) law which were absent from adat law.

Again in 1919 he reacted sharply with 'The Indonesian and his land' to Pleyte's bill which aimed at introducing a western-style ownership to Indonesian land holdings. This fierce little publication contained a penetrating analysis of traditional land rights the nature of which had been the subject of considerable controversy. The heart of this controversy was whether, and how far, the village right of avail **

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* Cf. Song of Solomon 1:6 (King James Version).

** For 'right of avail', see p. 278, Chapter IV, note 2.

extended to virgin land, a crucial issue in view of the possible granting of long-term leases for European plantations.

Pleyte's bill was withdrawn, but in 1919 a new amendment of section 75 of the Indies Constitution of 1854 came into force. It provided that western law would apply to Europeans; that parts of western law might be applied to Indonesians who otherwise, however, would remain subject to adat law 'insofar as it is not in conflict with generally recognized principles of fairness and justice'; and that individual Indonesians could submit voluntarily to the law for Europeans.

But the idea of unification was not abandoned. In 1923, Cowan's draft bill for a unified civil code for the Dutch East Indies was published in Batavia. Van Vollenhoven reacted with a polemical article on 'Ready-made Law' (1925).[11] His scathing attack on the ludicrously complicated form of the bill ended with the peroration:

> 'The plan has no connexion with any tried and tested system of government in the Indies; it fits into no acceptable or accepted framework. It derives from that barren age of dogmatic juristic intellectualism, when the only known dogmatic system was the Byzantine-Napoleonic, when rules had to be formulated for every contingency, and when it was seriously believed that a couple of gentlemen — one in Batavia and one in The Hague — could fabricate a living law merely by publishing something in the Government Gazette and telling the courts to apply it.'

In this connexion it will be useful to refer briefly to three other works by Van Vollenhoven. In 1922, together with some colleagues, he put forward a 'Specimen Constitution for the Dutch East Indies'. This had been commissioned by the government, but it was put aside by De Graaff, who had become Minister for the Colonies, because it went too far in granting colonial autonomy, and in aiming at the least possible government interference with adat law.

A posthumous volume on colonial constitutional law, *Staatsrecht Overzee* (1934), makes evident how aware Van Vollenhoven — who mainly worked from a study in Leiden — was of the intricacies and difficulties resulting from the confrontation of western and eastern legal conceptions of government, law and order, and justice.

In 1910, his specimen 'Adat Law Code' summarized in about a hundred articles the main rules and methods of adat law as it then operated. It did not pretend to formulate a synthesis of the great variety of adat law in the archipelago; it merely attempted to provide a useful basis for further study, especially for European-trained lawyers

who had to deal with adat law. Too little use has been made of it.

The little book on the 'Discovery of Adat Law' (1928) is a masterly historical essay on the growing knowledge of adat law and the principal workers in this field — except his own person.

On the last page of his 'Misconceptions' (1909) we find Van Vollenhoven's credo: 'Our objective is not to know adat law for the sake of juridical science, still less to impede Indonesia's development by fondly preserving adat-curiosa; our aim is to create, not on paper but in reality, good government and a good administration of justice, both of which are unthinkable without a thorough knowledge of indigenous law and indigenous conceptions.'

What influence did this eminent scholar and those inspired by him exert on Indonesian legal development in the last forty years of Dutch rule? The question has a bearing on Indonesia's policy as an independent state.

Van Vollenhoven himself saw the usefulness of piecemeal legislation concerning Indonesian private law,[12] and perhaps even — as appears from his specimen 'Adat Law Code' — of a very general codification. Yet the incorporation of adat law as an essential element in the wider and more complex legal order of an Indonesian constitution ran aground in the controversy over whether it should be assimilated to the western legal framework or be differentiated according to ethnic group. Only casual attention was given to a realistic appraisal of a possible synthesis of the two.

In the final pages of his *Adatrecht* (vol. II:878ff.) Van Vollenhoven argued that in the last resort neither Ministries and Departments in Holland and Indonesia, nor legal practitioners and scholars, but the Indonesian people in the villages held the fate of adat law in their hands. For some, this formulation begs the question. If the outside world impinges on village life — and this process was already well under way even in Van Vollenhoven's time — traditional adat law gives the people insufficient protection against exploitation. Indeed, as Van Vollenhoven said, the future of adat law depended upon its utilitarian value, its capacity for development and the resistance it could offer. So the question becomes: useful for what, development towards what, resistance to what?

It is a pity that I. A. Nederburgh's study, 'Chapters on Adat Law' (1933),[13] was published after Van Vollenhoven's death, for this was the first dispassionate discussion of the important question of whether

the course of development in the Indies did not impose a duty to refrain from artificially protecting Indonesian adat law. Nederburgh said (p. 126) with justification that the era of closed communities leading their own lives was almost everywhere a thing of the past, and that, though it was good to appreciate adat law, a balance needed to be struck.

Nederburgh had expressed the same idea much earlier in an article (1905) on an optional national law for Indonesia, an 'intermediate law' applicable to particular population groups (e.g., the Indonesian Christians and the Chinese) and in inter-cultural situations, a law to which others could voluntarily submit. Van Vollenhoven's response [14] was unenthusiastic: the plan offered no solution for the great majority of Indonesians, and it would first require thorough research into the existing adat law.

In the later study, however, Nederburgh started from the premise that western law was of a higher scientific and practical value than adat law (p. 88), and that in the nature of things adat law was bound gradually to be replaced largely by western regulations. He pointed out that Van Vollenhoven (*Adatrecht* I:39) had originally said the same thing, but that the 'highly esteemed author', by his love of adat law, often lost sight of his own pronouncements and took the real or imagined disparagement of adat law far too seriously (p. 89).

Van Vollenhoven's influential pupil Ter Haar replied (1933) to Nederburgh, completely rejecting his arguments: the book made a useful contribution neither to the literature of adat law nor to that of constitutional law; the interpretation of statute law was destructive and confusing; and the basic premises of the argument had not been clearly expounded.

Yet Nederburgh was pointing to developments which have become realities today.

This was a dialogue between people who are no longer alive. Their polemics seem now to have been too strongly governed by an exaggerated sense of opposition between two views: one that western law was 'higher' than adat law; the other blindly defending adat law. Surely this tended to obscure the real problem of the development of law. Without its social context, law would be a meaningless fabric of rules and commands. Its *value* can only be tested by relating it directly to the needs of a *particular* society, that is in relation to all factors which determine the choice of priorities in it.

Adat law was probably of the highest value for the small closed

Indonesian communities which still existed in Van Vollenhoven's time, but it became less appropriate as the structure of these communities was undermined by new developments which destroyed their economic self-sufficiency. With the change of priorities a new order was needed.

Legislative measures aimed at fostering a stronger organization or greater economic viability met with much opposition from Van Vollenhoven's side whenever they took too little account of adat.

Thus the Native Municipalities Ordinance for Java and Madura 1906, which aimed at clearly delineating internal government and the control of village finances, was regarded by Van Vollenhoven as too little based on the original *désa* institutions.[15] Reclamation ordinances aimed at preventing a deforestation dangerous to agriculture he considered to be insufficiently consonant with the community right of avail.[16] Finally the 1908 Ordinance on credit facilities, which provided for the encumbrance of land in cases of debt, thus avoiding the often onerous consequences of the adat way of handing over land in return for a loan, Van Vollenhoven thought to be a negation of everything adat law stood for (*Adatrecht* I:634). Nevertheless these and other measures, however poorly thought out and imperfect from an adat law point of view, did have many favourable effects. The mortgage credit facilities of the General Agrarian Bank, for example, saved many people from hopeless indebtedness.

Practice, moreover, teaches that there may be a fairly quick absorption of and readjustment to new law at the lower levels, and often a remarkable synthesis between old and new.

The reproaches against Nederburgh's prejudice in favour of western law were probably not unfounded. But his early proposal for the creation of an intermediate 'Indonesian national law' did not warrant Van Vollenhoven's initial dismissal of it as a mere 'embellishment' of the Government Gazette. Indeed, he was later (*Adatrecht* II:860) to call the proposals 'fresh and sound'.

No one knowing Van Vollenhoven's work would say that he had no understanding of the development that adat law would have to go through to contribute adequately to the Indonesian legal order, or that he had no appreciation of the fact that the closed society of small tribal villages or of diminutive self-governing states was vulnerable to relentless commercial influences from without. Yet it seems likely that he underestimated their rapid progress and overrated the powers of resistance of adat law.

Today, Indonesia is not only open to all sorts of outside powers and

influences, but it is struggling with the problem of resisting and controlling foreign exploitation of its primary resources. Adat law has no institutions which could enable it to operate effectively outside the sphere of the local communities, or to prevent the abuse of foreign concessions.

Might not a less dogmatic adherence to adat law and legal pluralism and the timely creation of some transitional law by the colonial authorities have been of greater service to the country and its people?

After Indonesia's independence, Soepomo, Ter Haar's close associate and his successor to the chair of adat law at Jakarta University, stressed the necessity for a new approach to adat law (Soepomo, 1947).

Indonesian legal scholars are now for instance bent over the task of producing a new law of contract to meet the needs of those who no longer operate on the village level. It will be influenced by principles of the former statute law for Europeans, but equally so by postulates borrowed from adat law. Act. No. 1 of 1974 establishes new marriage provisions, which seem to involve a considerable emancipation of women, in conformity with the ideas of a new era. Similarly it was only after Indonesia became independent that attention was paid to the creation of a modern labour law.

On the other hand, as far as land was concerned, it was undoubtedly wise of the Dutch legislature to preserve adat law in 1870, and to make explicit the inviolability of land belonging to the villages.[17] Although the right of avail of the village over the uncultivated land within its jurisdiction — a right which is in principle inalienable — was not always fully respected with long-term leases or concessions for European plantations, this does not diminish the fact that this colonial legislation spared Indonesians the disastrous dispossession experienced by small farmers in Burma as the results of their indebtedness to Indians and Chinese (Furnivall, 1948:91ff., 224ff.).

Political controversy

Though Van Vollenhoven was regarded as a protagonist of the 'ethical policy' of colonial reform, it is difficult to determine where he stood in relation to the already powerful Indonesian nationalist movement. He did not contribute to the moderately progressive journal *De Stuw,* started by H. J. van Mook in 1930. His biographer quotes the following passages from a private letter, written in 1922: 'I have thought deeply about the dilemma. I remain of the opinion that we shall never achieve a good policy in Indonesia if we do not make this natural nationalistic

feeling of the Indonesians the centre of our attention. As I see it, the Philippines and British India teach the same lesson. Whether this will result in "independence" with strong cultural bonds between Indonesia and Holland, or in a self-governing dominion, is to my mind an irrelevant question, for by the time we have come that far the world and the League of Nations will be very different from what they are now' (De Beaufort, 1954:143).

That Van Vollenhoven envisaged a great degree of self-government and autonomy for Indonesia is evident from his biography and from his constitutional studies (1934), but it seems most unlikely that he ever visualized an Indonesia totally separate from the Netherlands.

One writer called the 'ethically minded' tragic because of their isolation. An equal tragedy is that they never succeeded in translating their main political aim, the emancipation of Indonesians, into terms with which the nationalist movement could identify itself. Wertheim (1964:213-224) and others has ascribed this to the mild paternalism which fostered the inertia of the masses, and to the absence of a fundamental reform of village structure and native land use (that is, contrary to Van Vollenhoven's policy) in order to absorb the increasing population. They believed this resulted in a lack of momentum, in a stagnant situation of 'shared poverty'.

It is a moot point whether more concrete results would have provided stronger arguments with which to defend the ethical policy and would have spared Van Vollenhoven the conservative attacks which were mounted against him and his University in the so-called Leiden-Utrecht controversy of the years 1924-32.

In 1925, as the results of contributions from business interests, politicians and intellectuals, a second Indological faculty was established at Utrecht University for the training of prospective colonial civil servants. According to its sponsors the Utrecht faculty was needed because of the 'inadequacy' of the Leiden training. In the words of Professor De Louter, the Leiden ideas about colonial affairs were out of step with the realities of the situation, the views of the government and the interests of the State. Leiden was accused of a priori and anti-historical methods, of overrating the value of adat and adat law, of wanting to reduce Dutch colonial authority, of opposing government measures, and so on; in short, of being against the existing legal order and the manner in which the Dutch authorities were carrying out their task.[18] Van Vollenhoven's anonymous editorials in the influential newspaper *De Nieuwe Rotterdamsche Courant* on autonomy for the

Indies, in which he likened the Indonesian desire for freedom to that of the Dutch people in 1572, only increased the opposition.

M. W. F. Treub, a politician and later chairman of the Industrial Council for the Dutch East Indies, became the most outspoken opponent of the Leiden teaching with the publication of a number of highly critical articles. The reply from Leiden, drafted by Van Vollenhoven and signed by seven professors, appeared in *De Gids* in 1925. Entitled 'The Attack on Leiden', it bore the motto: 'Thou shalt not bear false witness against thy neighbour'. From this began a fierce pen battle, which lasted for years, but Van Vollenhoven's biographer doubts whether the 'bellicose' tone of his replies persuaded any of the opposition (De Beaufort, 1954:154). He became dispirited by the attacks, which he interpreted as questioning the patriotic spirit of his University and his own integrity. As a conscientious thinker and academic he welcomed a spirited scholarly debate; but he was no political fire-eater, and the fierce controversy between sister universities took toll of his health and spirits.

II. *Views on Law and Methodology*

Van Vollenhoven's inaugural lecture inclines one to believe that his views on law were based on 19th century legal positivism, modified first by a belief that the content of law was determined partly by ethical and political postulates, and secondly by the conviction that the logical and systematic formulation of norms should be supplemented by inquiry into social facts to discover rules of law.

Van Vollenhoven's approach to the study of adat law has been defined as follows: 'At first his scientific interest in this material was of an ethnographic nature; the "Ethnologische Jurisprudenz", too, was ethnologically and historically rather than juridically oriented. From the vast jumble of social phenomena, Van Vollenhoven abstracted the legal institutions without violating their ethnological context. He discovered the principal features of a common Indonesian "law region" [p. 41, below], the enduring framework of legal rules and institutions in all their diversity according to time and place.' [19]

But Van Vollenhoven's views do not appear to have remained unchanged, and we should trace their development during his career.

In his inaugural lecture (1901), holding the view that jurisprudence is an exact, empirical science, and accepting the diversity of human

law, he defines what he understands by law. 'We speak of law only when a rule of conduct is sustained not merely by consideration of advantage or disadvantage, praise or blame, but by coercion as a guide to precept and prohibition. Hence, in the absence of an authority willing and able to enforce rules of conduct, law is absent; if authority sleeps, law lies idle; rules of conduct not yet, or no longer, stamped as law by authority have meaning only as future or past law. The diversity in human law can be ascribed first to the diversity of these countless communities which, because they are based on law (—), should be called jural communities; secondly, to the rich variety of their legal products; and finally, to the greater or lesser strength with which these jural communities succeeded in sustaining the constituent parts of the law they have created.'

The concept of jural communities continues to dominate his methodology. Carefully characterized in the first volume of his *Adatrecht* (Chapter IV, below), it refers mainly to the small autonomous communities of all kinds — kinship or territorially based communities, voluntary associations for various purposes — but also to smaller or larger principalities.

Coercion and the authority of jural communities are thus the pillars on which the order of law, including adat law, depends.

Later in his inaugural lecture he remarked (p. 27) that the function of legal science ends with systematic, historical and comparative inquiry into the constitutions, practice and regularities of the law. In his a-philosophical view, courts and legislatures were expected to make the idea of law a reality and to satisfy a sense of justice, but *jurisprudence* should be concerned only with law as it operated 'at ground level' (pp. 29-30).

But five years later, when the first instalment of his *Adatrecht* appeared (p. 1ff., below), he seems to have modified his earlier opinion that coercion and authority are the pillars of law. He points to the profound difference between the law of Holland and Indonesian adat law: the one a 'fairly comprehensive and coherent whole' formulated in codified laws and regulations, outwardly sharply 'distinct from rules of morality, conduct and aesthetics'; the other 'different', with written law for only a minority of legal situations and relationships, and the greater part an uncodified mass, in which broad guidelines are certainly discernable, but different according to population group, and with legal changes more often brought about by free and unconscious growth than by deliberate decision.

'Viewed through the eyes of a codist the legal inventory of the Indies presents a jumble, an incomplete, inadequate and untidy whole; but when explored by one whose desire for knowledge and explanation of the living law on earth is inspired by the very diversity of its past and present manifestations, this same inventory becomes an inexhaustible source of instruction' (pp. 1-2, below).

This law of Malayo-Polynesian origin has been exposed to a succession of foreign influences: Hindu, Islamic, Chinese, European (Portuguese, English, Dutch); yet autochthonous institutions have remained the most important part of the legal composite. Accordingly, 'the oriental legal institutions have to be considered in a common frame together with the western law. On the other hand, it is obviously impossible to divorce these legal institutions from the non-legal elements of popular customs and beliefs' (p. 3, below).

There being no general Indonesian term for this oriental legal system, Van Vollenhoven gave careful thought to the most suitable term. Arguing against the adoption of 'customary law' and other definitions he finally decided on a compound based on *adat,* the widely known Arabic word for 'custom'. Hence, for '*adat* with legal consequences', *adat law* would be appropriate, as the term did not imply a rigid division between matters of law and other *adat.*

What did Van Vollenhoven understand by *legal consequences*? He observes that it is often doubtful whether we are dealing with 'legal' or with other usages, for instance, as regards reciprocal contributions to wedding feasts or the ritual evasion of marriage prohibitions. But even though some rules would not be regarded as 'law' by western opinion, 'if they carry an enforceable sanction, how could this name be denied to them?' (p. 6, below).

As we read it, enforceable sanction here means human punishment, or the human power to make something *pantang,* forbidden. Yet he recognizes that difficulty and confusion arise when certain conduct is prohibited as likely to provoke the wrath of the gods or spirits (*pantang, rebu, pemali*), but its violation is punished by humans as well.

Twenty years later, when writing on the 'Maintenance of Adat Law' (Chapter VIII, below), Van Vollenhoven's understanding had deepened, not least by the flood of fresh materials from workers in the field. His concept of adat law is now placed on a much broader basis. His earlier distinction between adat and adat law, that is the use of human coercive sanctions, is less important. In general, he argues, people comply

with adat law not because of the threat of judicial force, but because compliance has become a habit, because they fear their ancestors, because violation would not serve their interests, and finally because of the force of oral tradition (below, pp. 215 ff.).

Moreover, there is the Indonesian 'practice of headmen and others of giving guidance in the observance of the adat, of taking it under their care and supervision, without there being any question as yet of the resolution of disputes or of action to enforce the law'. In his 'attested law observance' (pp. 222 ff., below), instead of the sanction of force, there is peaceful consultation and patient mediation, in which religion, myth and tradition all play an important part.

Also the action of Indonesian adat-judges, when they do adjudicate in dispute, is characterized by attempted mediation, accommodation and reconciliation of conflicting individual and communal interests.

Attested observance of the law by headmen and other socially prominent figures, and the accommodating character of indigenous justice — 'a hundred times more effective than adjudication by the commanding voice of authority' — are natural because these notables are seen as part of the cosmic order of society. They act and speak as those whose duty it is to 'see that the wishes of the ancestors are observed and to act as their earthly representatives' (p. 227, below). Accordingly the adat judges are neither bound to accept as true that which is not in dispute, nor to accept as law what the litigants assert to be such. They have an independent contribution to make in finding the facts and law of the case (below, pp. 253-4).

When the vast majority of a country's inhabitants has for centuries adhered to one or other of the great religions, elements derived from these will be adopted into the indigenous legal system. But Van Vollenhoven showed convincingly that, so far as religious influences were concerned, it was the belief in watchful ancestral spirits, and other so-called pagan features of Malayo-Polynesian origin, that still predominated in most of Indonesian adat law and indigenous judicial practice. In Chapter II below, some of his most spirited pages are devoted to refuting the premise that 'law follows religion, that the pagan Indonesian therefore has pagan law, the Hindu Hindu law, the Moslem Moslem law, the Christian Christian law — a supposition which ... is emphatically contradicted by the facts' (below, p. 8). Nevertheless, he found this aspect important enough to return to some twenty years later, when in the second volume of his *Adatrecht* he devoted a hundred pages or so (not reproduced in the present edition)

to a meticulous examination of pagan, Hindu, Moslem and Christian features in adat law.

By 1918 Van Vollenhoven had completed a systematic description of Indonesian adat law in nineteen 'law areas' (*rechtskringen*). Some of these he distinguished as self-evident, but others more hesitantly. In distinguishing law areas (Chapter IV, below) he relied less on the differences between 'specific legal rules', than on 'the different structures of jural communities'.

Indeed, Van Vollenhoven's work is marked from the outset by the conviction that law can only be known through examination of the jural communities in which it applies. Hence he objected strongly to restricting or restructuring the indigenous jural communities.

The critical significance of the internal configuration of these communities for the nature and 'cut' of adat law can be gauged from his descriptions of the law areas, for the systematic description of which he worked out a standard model comprising these rubrics:

1. *Jural communities* (socio-political organization).
2. *Individuals* (personal status, rights and duties).
3. *Government, justice, legislation* (constitutional law).
4. *Inter-local law* (the law between villages).[20]
5. *The law of kinship.*
6. *Marriage law.*
7. *The law of inheritance.*
8. *Land law.*
9. *Law of chattels* (obligations, rights to movables).
10. *The law of wrongs* (without division between civil and criminal wrongs).
11. *Legal remedies* (procedures, sanctions).

It can be seen from this that Van Vollenhoven largely departed from the usual methodology of continental European law. He believed that the use of Roman law constructs could only lead to a misunderstanding of differently conceptualized legal categories. Not only did he succeed as nobody before him in sympathetically understanding the concepts and properties of Indonesian law, but he often sharply attacked the common misconceptions of it. In the words of Van Ossenbruggen:

> 'Van Vollenhoven immediately saw that the way in which orientals draw distinctions and classify is vastly different from that of occidentals. The oriental ... makes sensory perception the basis of his legal categories and distinctions ...; abstract juridical contructions are foreign to him. For example, our distinction

> between rights *in personam* and rights *in rem* is incomprehensible to him, whereas to divide legal transactions in land and water from those in all other goods seems natural' (1933:XII).

In Van Vollenhoven's methodology the clarification of Indonesian legal conceptions had to serve the ends of justice in colonial judicial practice. In the very different Indonesian conceptual world, government courts — especially in the earlier days — often failed to give judgments comprehensible and acceptable to the people. An important part of Van Vollenhoven's work therefore consisted of exposing fallacious or erroneous premises used by government courts — especially the *landraad* courts — which dispensed justice 'in the King's name'. A few examples may suffice.

Land could not be 'pledged', because in terms of section 1150 of the Indies Civil Code this was possible only in respect of movables. Yet a common transaction in adat law involves the redeemable transfer (*jual gadai)* of a person's land in return for a loan of money. (For the terminological problem, see footnote p. 102, below.)

The courts regularly employed the distinction between *jura in rem* and *jura in personam,* which has no equivalent in adat law.

Totally foreign to Indonesian conceptions of justice was the 'dismissal' of actions on account of a litigant's lack of capacity, a court's lack of jurisdiction, or the failure to start proceedings within a prescribed time.

A misconception which particularly attracted Van Vollenhoven's attention concerned the highly sensitive area of indigenous land rights, the 'highest' of which he called *beschikkingsrecht* ('right of avail' — see p. 278, Chapter IV, note 2). Being indissolubly bound up with the key-concept of 'jural community', he gave it priority in his description of each law area. He understood this right to be religiously rooted and to reflect the fundamental connexion of a human group to the deities and spirits of the land it inhabits. The earliest (and fullest) summary of the nature and content of the right appears not in his *Adatrecht,* but in one of his lectures on 'Misconceptions of Adat Law' (1909) given at the Academy of Netherlands-Indies Civil Officers. It is worth reproducing here, for it is of value even today when third-world governments face problems of agrarian reform.

> 'The right of avail ... applies when an indigenous jural community, whether territorial (native municipality, self-governing chiefdom) or genealogical (family, lineage, clan), claims to have within a certain area the exclusive *right* to avail itself of the

land. In general, the manifestations of this right are six: first, the community and its members may freely exploit any virgin land within this area (e.g. clearing it for agriculture, founding a village, gathering forest produce); secondly, outsiders may do these things only with the community's permission, and commit an offence (*maling utan*) without this; thirdly, outsiders, and sometimes even members, must pay some compensation (*séwa bumi,* etc.) or tribute (*ulu taon*) for such exploitation; fourthly, the community retains to a greater or lesser extent some control over cultivated lands within this area; fifthly, it is held liable for unaccountable delicts within the area (e.g. when the perpetrators remain undetected); sixthly — and this is not the least remarkable feature of the right of avail — it cannot be permanently alienated' (Van Vollenhoven, 1909:19-20).[21]

Van Vollenhoven reproached the colonial government for being 'uncertain', 'inconsistent', and 'unjust' in its attitude towards this right, which was sometimes fully respected, sometimes partially recognized, and sometimes totally ignored (e.g. with the granting of long-term leases or concessions to European agrarian enterprises). The issue was (and is) juridically difficult and politically delicate.

The agrarian law of 1870 guaranteed full protection of the rights of the indigenous people to all land 'cleared by them for their own use or as common pasture, or for any other reason', but the crucial question was whether this covered the so-called 'virgin lands', which were not in regular use but from which the villagers derived occasional benefit.

The prevailing opinion in government circles was that a community's right of avail to virgin land was no more than a rather loose claim, perhaps involving some form of administrative control, and that the land belonged to the 'free domain of the State', which accordingly could be leased to European enterprises for agrarian or other profitable purposes. Van Vollenhoven rejected this interpretation as the view of 'statute book lawyers ignorant of and unwilling to know any system other than Justinian's and the Napoleonic-Dutch'.

The issue stirred public opinion for many years, but by the first quarter of the 20th century the granting of leases had been drastically curtailed.

More recently, however, the Indonesian government, in the basic Agrarian Law 1960 (*section 3*), adopted the principle that the adat communities' right of avail, so far as it still existed, might only be

exercised in ways compatible with the national interest and with enacted laws and regulations.

Though the struggle for adat law was largely successful, in that its existence could no longer be denied and the courts gave it serious attention, yet the dividing line between adat as custom and adat *law* continued to pose a problem. On what grounds could one determine its binding character? How could innovations in adat law qualify as *customary* law if the Roman criterion of *inveterata consuetudo* were to be applied? How could one ascribe to adat law a body of objective and pre-existing rules if the conciliatory nature of adat justice made it constantly necessary for adat judges to 'find' or 'create' the law applicable in individual cases? Since only a very small and unknown minority of adat disputes were settled in a court of law, how often, and when, could one be certain of dealing with judicially sanctioned rules?

In his chapter on the maintenance of adat law (VIII, below) Van Vollenhoven addressed himself to these questions.

> 'The people of the village who voluntarily observe the ancestral adat law, the adat heads who attest its observance, and the courts which dispense justice in the spirit of adat law, they all see ... how adat law grows under their own hands' (below, p. 256).

And he remonstrated:

> 'If a rule is so deeply ingrained that nobody would dream of breaking it, with the result that nobody remembers it to have been judicially affirmed, would it therefore not be adat law? If [some] rules ... are so well protected by the authoritative guidance of headmen and elders — much more important here than adjudication in the narrow sense — that no judicial action to obtain their observance can be remembered, would they therefore fail to qualify as adat law? Whenever a true adat judge has before him a case, and nobody remembers a like case to have been decided, is he to turn the petitioner away on the pretext that, though a custom may have been violated, there has been no breach of law? — as though every question of law did not have to be raised for a first time!' (below, p. 257).

He then reformulated his approach. Adat law was to be found by 'careful enquiry into how, in a given area, matters of consequence for the legal order are usually done or tolerated as being normal ..., and how, in cases of deviation, fellow villagers or adat heads, or occasionally the courts, react ... Even approbation and disapproba-

tion, if inextricably associated with precept and prohibition in popular thinking and conduct, are law and not mere morality ... In cases of dispute adat judges had to determine the difference between normal peaceful usage ... and disruptive deviance which they could not possibly ignore' (p. 258, below).

After Van Vollenhoven's death, Ter Haar (1937) formulated a more formally juristic view. Speaking at the 13th anniversary of the Batavia Law School he stressed that the science of adat private law, like any other positive jurisprudence, was a science of contemporary positive law, and not to be classified under legal ethnology, sociology, or historical or comparative jurisprudence. Not being a written law 'except for the insignificant part of it which is contained in written village regulations and princely edicts, ... valid adat law is therefore to be learned only from the decisions made by the authoritative functionaries of the group ..., whether or not in situations of conflict, with due regard to the coherence and interaction of the *structural ties* and *values* of the community' (1937:4; original italics).

This drew a spirited reply from F. D. Holleman (then holding the chair of Adat Law at Leiden). Why, he asked, this artificial restriction of the field of study and of the criterion of adat law? Hitherto it had been accepted by students of adat law, including Van Vollenhoven, that law comprised all legal norms which a scientifically and juridically reliable enquiry could abstract from the *reality of legal commerce in society*. What was this reality? Everyday life with its social intercourse in every field, in which legal norms were not as a rule separated from social norms but a particular species of them, recognizable by those who observed their operation from a juridical point of view. Authoritative decisions, however important they undoubtedly were, should not be overrated. Adat justice on the whole dealt with concrete interests, and its decisions were nearly always expressed in terms of concrete issues and not of legal rules — though trained lawyers could formulate them in legal terms (Holleman, 1938:430ff.).

The opposing views in this debate seemed to be motivated, on one side, by a desire for the sake of legal certainty to provide adat law with a formal criterion (the judicial decision, jurisdiction), and, on the other, by a fear that such a criterion would unduly restrict the meaning of operative adat law, the essential criterion of which lay in the interaction generally between habitual social practice and impermissible deviance from it (as Van Vollenhoven had indicated).

In a short article on 'The Judge's Task' (1938), Logemann attempted

to reconcile these views. He believed Holleman's opposition to Ter Haar to be engendered by fear of the dominating role of government judges, who would be inclined to dismiss the conciliatory decisions of indigenous tribunals as of little value for ascertaining operative adat law. He suggested that, 'If judgments were presented and taken note of in full, instead of merely as the (concluding dictum) of a detailed account, the so-called conciliatory adat judgment would be as valuable a guide to subsequent jurisdiction as any other judgment' (1938:36).

The history of judicial practice teaches that there was some justification for Holleman's fear, but Logemann did not answer the principal question. The crucial point is that 'law' is something other than 'fact', that 'ought' (*sollen*) is something other than 'is' (*sein*), but that nonetheless the two are closely connected. Van Vollenhoven glimpsed the question early in his *Adatrecht* (vol. I:71-75) when dealing extensively with the connexions and the differences between ethnological data and law, unfortunately without arriving at a clear conclusion.

Because of the dualism of Dutch codified law and indigenous folk law in the Indies, adat law often threatened to become relegated to the field of morality or custom. The situation did not change immediately with independence for Indonesia, but the constitutional basis for the formal division between the two systems has now been removed and Indonesia is on the way to a single system of national law, a development which faces it with the difficult task of how to accommodate the traditional law of the people in the new system. Hence a fundamental study, in the light of present-day circumstances and in a broad context, of the problems revealed by Van Vollenhoven's scientific approach to adat law as positive law, would be of great value.

III. *The Discovery of Adat Law*

Van Vollenhoven has been called the 'discoverer of adat law'. According to Van Ossenbruggen (1933:I), 'The most important fact is expressed in one all-embracing word: Van Vollenhoven elevated adat law to a *science*. Though much that preceded his work was of value — I need but mention Snouck Hurgronje, Wilken and Liefrinck — a science of adat law did not exist before Van Vollenhoven and without him would probably not yet have been created.'

In his brilliant little study on 'The Discovery of Adat Law' (1928), Van Vollenhoven himself regarded Wilken (1847-1891) as the man through whose work 'adat law for the first time achieved an indepen-

dent place in the wide range of ethnographic data. Admittedly, with Marsden, Raffles and Crawfurd it was presented under the rubric of 'law' or 'government', but in the way in which games, food habits or modes of dress also appeared under separate headings. Marsden's last chapter on adat law runs over into native pastimes. With Wilken, however, adat law is a subject in its own right, though he rightly leaves its connexion with folk custom and folk religion intact' (1928:101-2).

Muntinghe (1773-1827), was the first to speak consistently about *adat*. One passage of a Memorandum of his to the Commissioners-General [22] of the Netherlands Indies (Batavia, 14/7/1817) reads: 'The institutions and customs of the people have remained veiled under the general term adat'. It was Snouck Hurgronje who later (1893:16) introduced the term adat law.

Naturally the question arises of what is meant by 'discovery'. For Van Vollenhoven (1928:1-2), it meant:

> '[A]lthough Indonesian adat law itself had its beginnings in the mists of time, an awareness of its existence and of its value only recently dawned upon us westerners. Strange as it may sound, this adat law indeed had to be discovered, and its discovery has cost time and effort. At first sight this seems to be a paradox. Surely we do not 'discover' the vernacular of the land which we visit. We either do or do not research the language, do or do not know it; but in any event we hear with our own ears that some people speak in words and idioms which we do not understand. Moreover, as soon as we come into regular contact with the people of a tropical country — with its government, system of taxation, land tenure, kinship system, inheritance and justice — we must surely now and again allow ourselves to be informed by the people themselves how these things are arranged and what peculiarities they have.'

[Nonetheless, adat law had to be 'discovered'],

> 'for virtually all peoples, western or eastern, have been late and slow in acquiring knowledge of their dialects, of their literature and even of their history; [and although] already during our Middle Ages the Indies, in Java at least, had its jurisprudents (Wilken, 1926:438), apparently they were practitioners only, not people who could enlighten a stranger about adat law' (1928:3).

Here Van Vollenhoven put his finger on a fact which has indelibly influenced the fate of adat law, namely that over a period of approximately three centuries until the 1920s the recording, the analysis, the

systematization of adat law and partly also its place in a constitutional context, has been the work of western research and scholarship. Jaspan (1965:252-3) has appropriately described the situation:

> 'The concept of *adat* law is rather broad since the term *adat* has several connotations including custom, usage, rule, proper behaviour and propriety. The concept of *hukum adat* was almost certainly a Dutch creation. Before Van Vollenhoven and his school began codifying what to Western jurists appeared to be the juridical aspects of native custom, adat law was not a separate and independent entity but was in most cases intertwined with the history, mythology and institutional charters ... of each ethnic or cultural unit ... In traditional Indonesian societies, both centralised and stateless, there were no professional jurists and no separate judiciaries. In the centralised states the sultans or other rulers, in the non-centralised societies the village headmen and elders, were both the repositories and the arbiters of what we may now, for convenience, call adat law. Outside Java — with the exception of the Yogyakarta and Surakarta principalities — much of the traditional adat law was carried over by the Dutch and made an integral part of the system of government by indirect rule.'

Van Vollenhoven's *Discovery* names about 450 people who over three centuries contributed in some way to the knowledge of this folk law, but Indonesian names are scarcely to be found. It was only after 1918, when he had completed his description of indigenous adat law (*Adatrecht,* vol. I), and written the most important of his polemical articles defending that law in the arena of colonial politics, and when he had already been lecturing for many years at Leiden, that a number of Indonesians,[23] chiefly through his personal influence, began to follow up his pioneer work.

As against them, four or five times their number of Dutch scholars published works on adat law in Van Vollenhoven's time.[24] This tardy interest in adat law on the part of Indonesian scholars was partly influenced by the fact that the Batavia Law School devoted (as the Jakarta Law Faculty still does) by far the greater part of its curriculum tot 'European' law. Add to this that some of the professional judges who administered adat law were less than well versed in it, and we may have a reason why, in present-day Indonesia, such great difficulties are engendered by the problem of shaping a national law and of finding a place in it for adat law.

The problem of discovering and accommodating adat law is part of a checkered colonial history of which a few facets and names should be mentioned.

The period of Company rule (1602-1790), though offering the best opportunity for finding genuine folk law, was used scarcely if at all for this purpose. The Company's legal system was aimed mainly at the coastal towns and suburbs under its direct control and rarely reached the rural hinterland. Initially, its law for orientals falling under its jurisdiction was the revised law of the Dutch Republic, occasionally modified for non-Christians and Chinese. Typical for this system was that Indonesians could voluntarily subject themselves to indigenous law, and it was not until 1824 that a Dutch statute decreed that those resident in the towns of Batavia, Semarang and Surabaya fell under government native justice and hence under rural adat law. Virtually the only time the Company became acquainted with indigenous law was when it intervened in princely justice in feudal territories, where a capable Company servant like Gobius at Cirebon learned to distinguish 'original Javanese law . . . of before Mohamedan times from the law of the evil Moslem clergy' (*Adatrecht* II:342).

Through her formal neutrality the Company therefore left the indigenous administration of justice largely intact (Carpentier Alting, 1926:222f.). Nevertheless, its armed presence, its demands for agrarian produce, and the sale (from 1705) of tracts of land to private European enterprise, must have affected adat land law, though it is not possible to form a clear picture of this (see Furnival, 1944:41, 46f.; Gonggrijp, 1928:28-77).

However little attention the East Indies Company paid to adat law, it did produce some chroniclers of Indonesian life in the 17th and early 18th century, including Rijckloff van Goens (Java), Speelman (the Mataramese principalities), Padt-brugge (Minahasa), Gobius (Cirebon) and Valentijn (Ambon).

But it was the Irishman William Marsden in whom Van Vollenhoven recognized 'the pioneer' of adat law studies (1928:14ff.). Written even before the final demise of the Company, his *History of Sumatra* (1783) deals mainly with the Rejang of Benkulu. The British interregnum also brought Crawfurd with his (still important) *History of the Indian Archipelago* (1820) and other works based on nine years of service and enquiry in various parts of the Indies; and Raffles, Lieutenant-General of Java from 1811 to 1816. For materials on Javanese adat law Raffles' *History of Java* (1817) relies too much on texts

from the central Javanese principalities, but his *Substance of a Minute on . . . internal management and the establishment of a land rental for Java* (1814) contains much valuable first-hand information collected by a team of able assistants from all over Java (Van Vollenhoven, 1928:27ff.). Yet the latter volume contains an annex — his Minute of 14/6/1813 — in which he states that the ownership of land was invariably regarded as exclusively vested in the sovereign or state — an opinion which started the protracted 'domain' controversy.

After the British there followed a thirty-year period of uncertainty, during which the new Kingdom of the Netherlands made efforts to replace the regime of the run-down and heavily indebted Company by a proper colonial government. Wholly in the spirit of the times, a policy was pursued which would give the motherland the greatest possible material gain, but yet would respect the rights of the indigenous people. It was a controversial question whether this was best achieved by state exploitation or private enterprise, but since both involved agrarian production for the world market the main interest in customary law concerned the nature of indigenous land rights (Boeke, 1918: 22). In a Memorandum (14/7/1817) to the transitional government ('Commission-General'), Muntinghe, one of Raffles' former counsellors, listed the conditions under which concessions to European agrarian enterprise might be made. The first to be included were:

— 'that no lands should be granted for this purpose other than those not cultivated, inhabited, or possessed by the Javanese people;

— that, consequently, this should exclude not only all peri-urban and rural villages, but also all lands known by the village authorities to lie within the village boundaries, or to be used as pasture for livestock.'

(Van Vollenhoven saw the latter condition as recognition of the Javanese village municipality and of its right not only over cultivated but also over waste land in its domain.)

Others, too, had displayed more liberal views. Dirk van Hogendorp, administrator (1794-98) in East Java and a convinced opponent of the Company regime, pleaded that the Javanese should not have to be — as Raffles had wanted — a kind of leaseholder of his land, but the 'owner' of it — not in the old Dutch common law meaning, but so that he could say: 'This land is mine' (Van Vollenhoven, 1928:37). While Dirk van Hogendorp started from an existing leasehold system which he wanted to change, his brother Gijsbert Karel, a leading politician in

Holland, considered that according to Dutch positive law the Javanese was already owner of the land.

In the Commission-General charged with taking over from the British there was no agreement on agrarian policy. Though both Elout and Van der Capellen considered it 'a matter of course that the Javanese small-farmer (*tani*) had to be guided', Elout thought in terms of private European estates such as the Company had fostered in West Java, while Van der Capellen believed that Java's agrarian economy should be exclusively the concern of the government (Boeke, 1918: 52-4). It was Elout's opinion that all of the Indies was 'the property of the sovereign' and hence 'every farmer a small tenant of the state' (Van Vollenhoven, 1928:41) — a view shared by Du Bus, the King's Commissioner in the Indies in 1825-30. By that time, with Holland's own economy in dire straits, the colony was a heavy financial burden.

Then Van den Bosch, as Commissioner-General (1830-32) invested with special powers, introduced the so-called *Cultuurstelsel* (Culture System) in Java. Unlike Raffles, whose ideas were biased by his knowledge of the principalities, Van den Bosch based his own doubtful conceptions largely on what he believed to be the situation in West Java. He rightly accepted that the Javanese village constitution comprised 'heirs, descendants of the first occupiers of the land', called *sinkap,* who were responsible for the whole land rent burden, in contrast to non-heirs. But he believed inheritance to be regulated by Moslem law; hence he saw land law as a mixture of Brahman and Moslem institutions, with adat as pliable as wax (ibid:43).

Under the new system the villages would contractually undertake to make one-fifth of their cultivated land available for the production (supervised by European officials) of crops for the European market (mainly sugar and coffee), but receive a proportionate reduction in land rent; the 'net profits' would go to the government.

In the decades that followed, the scheme proved a great success financially, but it played havoc with village institutions and land rights.

Van den Bosch was succeeded by Baud, a conscientious and clear-headed administrator. Though he extended his predecessor's policy he was not blind to its hardships, which he tried to mitigate. Sensitive to the autonomy of the Javanese village and its right of avail over uncultivated land within its domain, he would later help to safeguard these rights in section 62 of the 1854 Constitution of the Indies — a provision which gave rise to great controversy over the territorial scope of the right of avail. In 1842 he founded the first School for Colonial

Civil Officers in Delft, and in 1851, though no scholar himself, he helped to create what is now the Royal Institute of Linguistics and Anthropology at Leiden.

The growing resistance to the abuses of the Culture System stimulated the study of Javanese land rights. Governor-General Duymaer van Twist (1851-56), for instance, ordered inquiries in Cirebon and Banyumas, and appointed a Commission to report on contracts between government and sugar producers in Java. The Commission's report, published in 1862 well after his retirement, 'put Cabinet and Parliament in a position to know at least something about Javanese land rights' (Van Vollenhoven, 1928:78). But the 'favourable turn of the tide' as far as the interest in adat law was concerned came about in 1865, when 'Parliament was forced to take note of agrarian problems and adat land law; the Indies administration of indigenous social organization and the constitution of adat communities; the Missions of adat family law and inheritance; and lawyers of transactions in land as well as in movables, and of problems of criminal law' (ibid:82).

In the period 1865-1870 Parliament dealt, among other things, with two bills, the 'Cultures Bill' of Fransen van de Putte (1865) and the 'Agrarian Bill' of De Waal (1869). The former, which aimed at reinforcing Javanese land rights while enabling Europeans to found estates on *virgin l*and, foundered on Thorbecke's opposition to the proposed recognition of a Javanese individual right of *ownership,* which he feared would adversely affect adat land law (see Idema, 1925: Ch. I). De Waal's Agrarian Bill, which became law in 1870, added supplementary paragraphs to the agrarian section 62 of the 1854 Constitution. Thus leases of land were not to exceed 75 years; no alienation was to interfere with indigenous rights; land cleared by natives for their own use, or belonging to a village for common pasture or other purpose, might be interfered with only 'in the public interest'; land occupied by natives in hereditary individual use might be granted in ownership to them at their request (subject to some limitations, e.g. as regards sale to non-natives), etc.

The fierce debates, particularly on Van de Putte's bill, led to a proclamation of Governor-General Sloet van de Beele, which assured 'the people of Java' that their individual and communal land rights would be recognized and protected, and that the nature of these rights would be thoroughly studied. These investigations resulted in a number of reports which proved to be among the richest contributions ever made to our knowledge of adat law: the *Résumé* on Bantam (1871); three

volumes of *Eindresumé* for Java and Madura (1876, 1880 and 1896); and eight *Résumés* for the Territories outside Java (1872-77).

At the same time that the agrarian question was providing politicians with some notion of adat law, colonial civil servants were becoming aware of it in new training courses at Leiden, Batavia and Delft. This improved the situation, 'although the name of the course, "Religious laws, indigenous institutions and customs", again had the result that what was taught was Islam and ethnology, but not adat law' (Van Vollenhoven, 1928:93-4).

Many civil servants and missionaries published on adat law, but trained lawyers contributed only at a later stage. There was a small handful of truly scholarly figures who preceded Van Vollenhoven or who were his older contemporaries: Wilken (1847-91), an administrator turned comparative ethnologist with special interests in adat law, who later became a professor at Leiden; Liefrinck (1853-1927), an administrator and specialist on Bali and Balinese Lombok; Snouck Hurgronje (1857-1936), an Arabist famed for his sojourn in Jeddah and Mecca disguised as a 'Moslem student of divinity', and an influential political adviser to the Indies government before becoming a professor at Leiden; Van Ossenbruggen, a legal scholar and teacher at schools for colonial administrators, later a high-court justice, with particular interest in Indonesian conceptualizations of adat institutions.

The first volume of Van Vollenhoven's *Adatrecht* (1918) reflects his indebtedness to their work, and in his *Discovery* (1928:99-110, 127-8) he singles them out for generous praise and a succinct analysis of their significance.

In 1909, at Van Vollenhoven's instigation, the Royal Institute of Linguistics and Anthropology (then at The Hague) established a 'Commission for Adat Law', which, supported by a sister institution in Batavia, set out to publish systematic collections of widely dispersed adat law data. Most of these were published in the *Adatrechtbundels* (45 volumes since 1910) which contain pieces of varying length, largely classified by the 'law areas' he distinguished. Partly concurrent with these ran the *Pandecten* (10 volumes between 1914 and 1936), consisting of brief quotations from writings on *adatrecht* systematically organized. There were collections of adat case law (1912, 1916, 1924, 1935), extensive bibliographies (1927, 1937) and a *Dictionnaire de termes de droit coutumier indonésien* (Van Hinloopen Labberton, 1934).

While the older material was being sorted out and systematically

published, new field research — mostly part-time by administrative and judicial functionaries — proliferated in topical studies, and many major monographs appeared, notably those of Mallinckrodt (Borneo), Korn (Bali), Soepomo (West Java), Vergouwen (Toba-Batak), Djojodigoeno and Tirtawinata (Central Java). In a mere thirty years, adat law scholarship yielded a vast literature,[25] virtually all of it cast into the mould which Van Vollenhoven had presented early in his *Adatrecht*.

IV. *The Place of Adat Law in the Indonesian Legal System*

The Dutch legislature was for a long period in a permanent state of conflict over whether the East Indies should have a single or a plural system of law.

As far back as 1747 the Company had made some provision for the administration of indigenous law for its subjects in the interior of Java. The system was later reformed by Daendels and Raffles and in 1824 it was introduced in the big towns. After 1838, however, when the codification of law was completed in Holland, many asked whether the Dutch legal doctrine, that custom gives rise to law only so far as referred to by the written law, should not also apply to Indonesian adat law. But the question was not affirmatively answered, and the 'General Provisions' of 1847 maintained the principle that, for reasons of fairness and good government, the (non-Christian) natives of the archipelago would as a rule be permitted to live according to their own laws and traditional institutions.

In 1854, section 75 of the new Constitution (*Regeringsreglement*) of the Indies laid it down that, except for European statutes declared applicable to Indonesians or to which Indonesians had voluntarily submitted themselves, native courts would apply the 'religious laws, institutions and customs of the natives, insofar as they are not in conflict with generally recognized principles of fairness and justice'. This section also subjected Europeans in civil, commercial and criminal matters to general decrees which were to conform as far as possible to Dutch statute law, and thus established the legal system of the East Indies on as basis of differential group law: a legal pluralism of regionally differing adat law for natives and 'foreign orientals' equated with them, and a Dutch statute law for Europeans.

The position has remained essentially the same in the subsequent Constitution (*Indische Staatsregeling*) of 1925.

In Volume II (1931) of his monumental *Adatrecht* Van Vollenhoven

devotes some 350 pages to an exhaustive analysis of 'The constitutional position of adat law in the legal system of the Netherlands East Indies'. One might lay aside those chapters with the thought: that is the past, it is no longer topical. Yet this is not so. Very many lacunae, misconceptions, objections and complicated technical problems which arose then continue to appear in independent Indonesia.

The essence of the problem of the constitutional 'accommodation' of adat law was seen by Van Vollenhoven in these terms: 'Even if the adat law of the Indies had been explored in all its recesses, and even if its maintenance were to conceal no secrets from us, it would still present us with a major problem unknown to western society. For in the total legal system of the Indies, adat law and western law lie side by side: seldom tidily organized and neatly fitted together, but mostly in some uneasiness, and occasionally in direct conflict. Does one of the two — this is the question — provide the dominant framework into which the other has to be fitted as a subordinate part, or are they co-ordinated within a common Indonesian frame? And if so, how is the one related to the other, and what is the structure that frames them both?' (*Adatrecht* II:405).

This problem has not been solved by Indonesian independence. Writing in the mid-1960s, Lev found that Indonesia 'wants to create a legal system which on the one hand is undeniably Indonesian, but on the other is modern and internationally acceptable. The legal profession is divided between those who lean towards an ideological approach, the *hukum revolusi,* and those who try to maintain the older symbols of their vocation. But both groups remain partially immersed in the world of colonial law in which they were brought up and in which, to some extent, law students continue to be trained' (1965: 305-6).

Though the division of citizens into juridical groups and the corresponding differences in legal status have disappeared, the 'European' private law of the colonial legal codes has remained operative. It continues to apply to those Indonesian nationals to whom it was declared applicable in the past, or who voluntarily submitted themselves (and their descendants) to it in whole or in part. The formulation of a uniform private law, and the place or influence of adat law, are largely unresolved problems. The same is true of criminal law, which is still governed by the Criminal Code of 1915.

What is incontestable, however, is that since 1900, through the ever increasing amount of material provided by field research and by

inquiry into the essentially 'oriental' values of Indonesian legal life, but above all through the creation of an appropriate *system,* that is by Van Vollenhoven's methodical classification of the materials of adat law, its exploration in depth has been made possible.

Administrative and Judicial Aspects

It should be emphasized that, even at the end of the colonial era, much of Indonesia was not directly ruled but consisted of some 275 smaller and larger 'self-governing territories' in which, with some limitations laid down in treaties, the powers of government were left to the autochthonous authorities. Even in Java, one of the oldest and most 'directly' ruled possessions, there were four recognized principalities under indirect rule.

This duality in the system of government had its origins far back in colonial history. The East India Company initially only established a few fortified coastal settlements in the archipelago. Gradually, however, mostly because of troubles in the interior which interfered with commerce, it had to extend its influence. But even after the Napoleonic Wars and the British interim government (1811-1816), when the Indies had been incorporated into the Kingdom of the Netherlands, Dutch governmental power was by no means established everywhere. During the protracted process of establishing its authority (Aceh was not subdued until 1904) it was often considered wise not to introduce direct government, but to be satisfied with treaties with Indonesian princes and peoples, in terms of section 44(1) of the 1854 Constitution.

As a result there was dualism not only in the kind of government — direct and indirect — but also in the administration of justice: justice in the King's name, alongside indigenous justice.

Moreover, even in the directly administered territories outside Java and Madura, partly for reasons of personnel, the indigenous system of justice was often maintained. In fact, in the 'Outer Provinces', that is, outside Java and Madura, more than half the area consisted of self-governing regions, ruled by indigenous princes or headmen and, usually, according to indigenous institutions. In these territories adat law could be practised without restriction, except that 'religious laws, institutions and customs' were not to conflict with 'generally recognized principles of fairness and justice'. Laws made by the central government, for example the 1915 Criminal Code, were in force in such territories only if declared applicable.

The government of independent Indonesia is trying to abolish this dualism, and the system of local government for which it has legislated is quite different from the colonial system of delegated and largely decentralized government. The extent to which the new system leaves room for an adat law guided and enforced by 'elders' and 'headmen', rooted in and legitimated by adat and adat law, is difficult to judge.

The colonial administration also recognized, throughout Indonesia, a large variety of so-called 'native municipalities', which were authorized to regulate and administer their internal affairs. In these municipalities, adat and adat law used to be observed and respected under the paternalistic guidance of Indonesian and European administrators, but this category of mainly traditional jural community, too, has been reshaped by post-colonial legislation, and so the question again arises of the continuation of adat institutions (Logemann, 1947:118-20).

Before the second World War, the East Indies system was often considered an example of good colonial government. It was well suited to the practical limitations of the colonial situation, and although Van Vollenhoven's posthumous publication on Constitutional Law (1934) criticizes the excessive interference by government administrative officers, it can still be said that the system generally gave great scope for the natural development of Indonesian institutions, especially in the last decades of the colonial era, when 'emancipation' of indigenous officials and decentralization of government had become fundamental policies (see De Kat Angelino II, 1931:365-82).

After the war, respect for this aspect of Dutch policy waned sharply. It was, and is still, argued by some that the deliberate protectionist policy had denied Indonesia many opportunities for development.[26] The protection of adat law was blamed for the backwardness of political, legal and economic structures.

There is no reason to suppose that the growth and reform of law in Indonesia could or should be different from anywhere else: on the one hand, the refinement of its own system; on the other, the reception of useful legal institutions from outside. Van Vollenhoven has sometimes been misunderstood in this respect. In 1919, for instance, he wrote: 'The country is too good and promising to be turned into an adat museum' (1919:29). And in his last essay: 'There is no need whatever to barricade access to western values — on the contrary, they may have to be imported to fertilize oriental ideas. But forced

westernization to suit our convenience can only bring disorder in an oriental society, and frustration to ourselves' (1933:239).

Administration of Justice

The administration of justice in the colony likewise had a basic dualism, with a distinction between:

a) *landsrechtspraak* or government justice 'in the King's name';
b) *inheemse rechtspraak* or indigenous administration of justice.

However, the two do not coincide with the administrative division between directly administered and self-governing territories.

Because in Van Vollenhoven's text below there are frequent references to different kinds of court dealing with adat law it is necessary to give a brief outline of this rather complex system.[27]

a) The *government* administration of justice was itself dualistic, in that there were different courts, depending on whether the defendant in a civil case or accused in a criminal case was European or not.

As regards Europeans it suffices to state that Dutch-derived statute law was applied by six regional courts (*raden van justitie*) as courts of first instance, and by a High Court as court of appeal.

For Indonesians, the colonial Constitution prescribed that, 'where the native people are not left in the enjoyment of their own administration of justice, justice shall be done in the King's name'. Local (*landraad*) courts — in some places called *rapat* — were the ordinary civil and criminal courts of first instance. Always in Java and Madura, and elsewhere as often as practicable, the presiding judge was juridically qualified. He was assisted by two indigenous court members besides a Moslem adviser and a *griffier* to record the process (often a young prospective judge); and in criminal cases by an indigenous prosecutor (*jaksa*) as well. In civil cases these courts mainly applied adat law — or what the Constitution referred to as 'religious laws, institutions and customs' — in a simplified western procedure; in criminal cases the Criminal Code of 1915 was applicable.

Appeals could be made to the regional courts (in 1938 the Batavia *raad van justitie* had a special bench for adat appeal cases attached to it).

The government system further included a variety of lesser tribunals for special purposes, such as regency and district courts for minor criminal matters, and so-called 'priestly' courts (a misnomer) in which

the head of a mosque (*penghulu*) dealt with matters of Moslem law affecting marriage, family property and inheritance.

b) About the *indigenous* system of justice it is important to know, first, that it operated not only in self-governing territories, but frequently also in directly administered areas in the Outer Provinces (i.e. outside Java and Madura). Second, in directly administered areas these indigenous tribunals operated under the supervision of the local administrator (i.e. the Resident Commissioner, with powers to issue judicial regulations, and to confirm, revise or quash judgments), and its sessions were usually chaired by a civil officer in a non-judicial advisory capacity; but even in self-governing regions the indigenous system was not free from the government's scrutiny. (In the Javanese principalities much of the indigenous system was even replaced by government courts 'at the request of the princely authorities' — Holleman, 1940:386).

In short, the term 'indigenous' (*inheemse*) justice means little more than that traditional judicial authorities (headmen, chiefs, princes, etc.) administered adat law, and were permitted to do so more or less in the manner of their forefathers. In self-governing territories the competence of these courts was limited to the 'subjects of these states', and a number of specified civil and criminal cases were withdrawn from their jurisdiction. But all civil claims involving land, houses or crops owned under adat law fell under their jurisdiction regardless of the identity of the parties.

The resolution of legal disputes at grass-roots level is commonly referred to as 'village justice' in adat law literature, but the term embraces the smaller jural adat communities generally. In traditional judicial systems and in everyday rural life these tribunals played (and often still play) a much more important role than justice at higher levels, for the vast majority of legal disputes were satisfactorily resolved here without having to be taken higher up. Working with little formality, and having no real powers to enforce judgments, these tribunals relied on a spirit of give and take, on mediation and conciliation, rather than on judicial incisiveness. This may be a reason why village justice was officially known as 'amicable settlement' or 'arbitration', but not 'jurisdiction' (*rechtspraak*), and hence not recognized as part of the indigenous administration of justice until the mid-1930s, long after Van Vollenhoven and other adat law scholars had testified to its

importance and popularity. The 1935 Ordinance on Village Justice (*dorpsrechtspraak*) not only formally legalized the judicial function of these village tribunals, but made it possible for a *landraad* court to refer a dispute to the village authorities for their decision before dealing itself with the matter. Thus government judges were provided both with a useful window on the mainstream of adat legal commerce from which they could only benefit, and a means of checking possible abuses of power (Ter Haar, 1939*a*).

Like most other ex-colonial states, Indonesia soon abolished the dualism of the colonial judicial system, the emergency legislation of 1951 being confirmed by the Judiciary Act 1970. By laying down that 'all administration of justice in the Republic shall be done by the State', section 3(1) of the Act formally abolished the former 'indigenous' administration of justice (the administrative duality and self-governing territories having been abolished in 1948 — Van den Steenhoven, 1974:256, note 7). The new judicial hierarchy has three tiers: local courts (*pengadilan negeri*), regional high-courts also acting as appeal courts (*pengadilan tinggi*), and the Supreme Court (*Mahkamah Agung*).

The local courts are a continuation (with revised competence) of the former *landraad* courts. They have jurisdiction in all civil and criminal matters not expressly reserved for the other courts, and are courts of first instance for all persons.

In addition, religious courts (*pengadilan agama*) have been retained, and there must be one for each local court.

In the Judiciary Act itself there is no mention of justice at the village level, which seems a step backwards from the 1935 Ordinance to those who believe it is essential for judges to keep in touch with the living law (Holleman & Sugijono, 1971). But the Explanatory Memorandum to the Act states that 'dispute resolution based on amicable settlement or arbitration outside court remains permissible' (Van den Steenhoven, 1974:256, note 1). So it is left to the discretion of government judges whether or not to be advised by village authorities on the antecedents of cases coming before them (for some heartening examples, see Van den Steenhoven, 1970 and 1974).

Finally, Indonesia has established a uniform judicial system as one of the means of promoting greater unity in the substantive private law. In this respect the problems are formidable, and often besides adat law the old colonial statute law is applied, though it is interpreted

more and more differently as time goes on. There is still a long way to go to a unified national private law.

H. W. J. Sonius

NOTES

1 Reproduced in his *Adatrecht* III:658.
2 In the original Dutch version (1920), reprinted in his *Adatrecht* III:569ff., he used *rechtsstam;* the English translation (*Illinois Law Review* XV(7), 1921) as 'law tribe' seems less appropriate.
3 There is a good biography by Henriette L. T. de Beaufort, *Cornelis van Vollenhoven,* Haarlem, 1954.
4 Protagonists of a renewal of the literary arts in the 1880s.
5 Van Vollenhoven commemorated him in the students' journal *Minerva* (6 May 1897); reprinted in his *VG* III:667ff.
6 *Exacte Rechtswetenschap,* Brill, Leiden, 1901; repr. in his *VG* I:3ff.
7 This excludes his efforts and publications in other fields of legal scholarship in which he excelled.
8 Reprinted in his *VG* III:686-7.
9 *De Gids,* (69), 1905:307ff.
10 Reprinted in *Adatrecht* III:22ff.
11 'Juridisch confectiewerk', reprinted in *Adatrecht* III:719ff.
12 *Adatrecht* II:13ff.
13 *Hoofdstukken over Adatrecht,* The Hague, 1933.
14 Reprinted in *Adatrecht* III:65ff.
15 *Adatrecht* I:517 *et passim.*
16 Ibid, 625f.; 1919:24 *et passim.*
17 Section 51 of the 1925 N.I. Constitution.
18 De Beaufort, 1954:153ff.; *VG* I:174ff.
19 *Enc. N.I.* (suppl. 1935:1381).
20 Van Vollenhoven used the term *adat-volkenrecht* (adat 'Law of Nations').
21 This summary can also be found in his *De Indonesiër en zijn Grond,* 1919:9-10.
22 Three *Kommissarissen-Generaal* formed the transitional government of the Dutch East Indies after the British interregnum. They were later replaced by a Governor-General.
23 They include: Moestapa (1913); Sanggoenodirajo (1924); Enda Boemi (1925); Soebroto (1925); Soepomo (1927; 1933); Soeripto (1929); Soekanto (1933); Hazairin (1936).
24 For adat law bibliographies, see 'The Ethnography of Law: a Bibliographical Survey' (ed. L. Nader, K. F. Koch, B. Cox), *Current Anthropology,* June, 1966.
25 See note 24.
26 See e.g. Soepomo (1947), Pye (1960), Wertheim (1964), Tas (1973:81-102).
27 For a more detailed and well documented survey (including most useful distribution tables) of the colonial judicial system, see the Introduction by Hoebel and Schiller to Ter Haar's *Adat Law in Indonesia* (1948:14-31).

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CHAPTER I

ADAT, ADAT LAW, NATIVE LAW

[September, 1906]

[3] He who turns from the law of the Netherlands to the law of the Dutch East Indies enters a new world.

He has learned to visualize law as a body of rules codified in statutes and decrees: outwardly distinct from rules of morality, conduct, and aesthetics, internally a fairly comprehensive and coherent whole, divided into four major segments — constitutional law, private law, administrative law, criminal law — each in turn organized on firm well-tested lines. He has become accustomed to think that the composition of these rules needs no other historical explanation than can be traced to the deliberation and resolutions of certain persons and institutions (Cabinet Ministers, Parliaments, Government Commissions), and that its prospects of future development will be determined only by further deliberations and resolutions.

Of the insight that law is but one phenomenon in a ceaselessly flowing society, engaged with other phenomena in a restless interaction of one contending force against another, he has grasped no more than the colourless phrase that the law must take into account the needs of society. And even if he does not feel entirely satisfied with this view of the law of his motherland he has to admit that the great majority have, consciously or unconsciously, accepted it, and that it does suffice for our everyday Dutch legal practice.

How different in the Indies! Here, too, codified law, but only for a numerical minority of legal situations and relationships. Here, too, fixed outlines in the field of uncodified law, but varying widely [4] according to the people concerned and their stage of development. Here, too, changes of the law by deliberate decisions, but many more by spontaneous and unconscious transformation. Viewed through the eyes of a codist the legal inventory of the Indies presents a jumble, an incomplete, inadequate and untidy whole; but when explored by one whose desire for knowledge and explanation of the living law

on earth is inspired by the very diversity of its past and present manifestations, this same inventory becomes an inexhaustible source of instruction.

It is not difficult to sketch in broad outline the present-day relations of codified to uncodified law in the Dutch East Indies. For Europeans and for those ranked as Europeans — numbering about 80,000, and all falling under the same codes of law — the position is similar to that in the Netherlands: written law is preponderant, and customary law the exception. On the other hand, for the 34 million natives (taking the archipelago as a whole), the constitutional, administrative and criminal law is partly codified, and the private law only very rarely; for them, then, uncodified law is the dominant rule. And finally, the category of 600,000 foreign orientals, ranked as natives: their law is in an intermediate position, for although they have far less uncodified law than the natives, their uncodified law is far more extensive than that of the Europeans and those ranked as such.

For these reasons the Dutch East Indies possesses a body of law of a type not found in the Netherlands — the uncodified law of natives and foreign orientals — or, should one wish to make use of Beseler's antithesis (*Volksrecht und Juristenrecht,* 1843), a 'lawyers' law' for westerners side by side with a 'popular law' for the rest of the population. But this oriental popular law has only this in common with the thimbleful of customary law of the Europeans and those classed as such: it is uncodified.

If this is the relative position of codified and uncodified law in the Indies nowadays, it hardly needs mentioning that there was a time when the islands of the archipelago knew nothing but uncodified law. It may be assumed that before the advent of Hindu civilization — dated, for Java, to the fifth century, and nowadays even to the [5] first century, A.D. — only the indigenous law of the Malayo-Polynesians was found in our archipelago. To this law foreign contributions have been made by Hinduism since the eighth century, and by Islam since the fourteenth and fifteenth centuries; and the late Middle Ages saw the arrival of the Chinese with their own popular law. But with all this, the total law of the archipelago remained uncodified. It was only when the Europeans (Portuguese, English, Dutch) arrived upon the scene in the sixteenth and subsequent centuries, that western regulations began to replace or supplement the uncodified law of the orientals. But even now, in areas where

European influence has penetrated slightly if at all, the only law is still the uncodified law of the population.

Since they are a part — indeed, the most important part — of the complex of law in the archipelago, the oriental legal institutions have to be considered in a common frame together with the western law. On the other hand, it is obviously impossible to divorce these legal institutions from the non-legal elements of popular customs and beliefs. Both these aspects are found in the ethnology of the Indies; and the best part of what we know about the popular law of the Indies we owe to ethnological studies. If, therefore, this uncodified law can be divorced neither from other ethnological material nor from the rest of the law of the Indies, a separate legal treatise can only be warranted if, from the outset, this twofold coherence is constantly kept in mind.

In a study of the uncodified law of the natives and foreign orientals the subject-matter therefore seems easily defined. But not the name! Neither legislation nor learned usage has been able to think up a technical term for this legal material which is both short and apt. And this point deserves the more attention because the multiplicity of terms in use reflects a host of greater and lesser misconceptions.

The *Regeringsreglement* [Constitution of the Netherlands East Indies, 1854][1] itself already provides three terms instead of one: [6] 'religious laws, institutions and customs' (s. 75(3)); 'religious laws or ancient sources' (s. 78(2)); 'popular institutions' (s. 71(3)).

In the rest of the East-Indies legislation the first of these expressions is often repeated, sometimes in a slightly modified form, such as: 'the religious laws, popular institutions and customs'. (—) But every now and then, other terms have been used,[2] for instance: 'the written law or old established custom' (—); 'native law' (—); 'local institutions and usages' (—); 'the popular institutions' (—); 'local usage' (—); and so on: a whole regiment of terms instead of one good name.

And if only one of these terms could be used; but in one the religious element is over-emphasized, while in another this aspect is completely ignored, and in a third not only the law of the people, but also all other matters of customs and manners are included. It therefore provoked amazement that the original draft (1904-1905) of the bill to amend sections 75 and 109 of the 1854 Constitution retained [7] the existing deficient terminology. The preliminary report of the Dutch Lower House (—) suggested 'customary law'. But this term, too, would be equally useless, because many parts of the uncodified law of the natives and foreign orientals can be pointed out which

are based not on custom but on statutory or other written provisions (such as village by-laws, princely edicts, the rules of Islamic school-law and of Chinese imperial law).

Legal practice, again, gets along with yet another word: it uses 'the law' (i.e., in a broad sense, the codified law) as against 'adat'. The latter term — the Arabic word [*ᶜādat*] for 'custom' — has found a place in many indigenous languages, either simply as *adat* or *'adat* (Javanese, Malay, Acehnese), or as *ngadat* (Javanese), *ödöt* (Gayonese), etc. Its appearance would suggest an association with the term the Indonesian himself would use, but this impression is wrong. For one reason, there is hardly any question of a fixed terminology in Indonesian languages. In Java, for instance, the word adat is used for all that is custom or ought to be customary: they speak of 'adat' in connexion with festivities, visits, homage, the preparation of food, the rice stock, and so on. In this sense the people of Minangkabau use, besides adat, also *limbago,* or *adat limbago*; and it has sometimes been said (Kooreman, 1901:146, 148f.) that 'adat' here represents 'law, or a binding rule of custom', as against non-obligatory customs referred to as *limbago.* But it would be wise not to rely too much on such distinctions (so often based on the pretentious prattle of indigenous authorities who want to impress the European investigator). In Minahasan Malay — and elsewhere, in the Moluccas — one uses *adat kebiasaan* or 'customary adat'.[3] The coupling of words, also known outside the Moluccas, is apparently intended to clarify the word adat. In the language of the Batak, at least of the Karo-Batak,[4] the term adat is uncommon, and popular custom is referred to as *basa* or *bicara.*

But the more important reason is that, in speaking of adat, the Indonesian never (or hardly ever?) includes those elements of the religious laws which are not rooted in 'the old law of the land'. These [*8*] religious elements are distinguished from adat under such not very strict terms as *agama* (Javanese), *hukōm* (Acehnese and Gayonese) and *hukum agama* (southern Sumatra). If, therefore, this naturalized word 'adat' is being used to indicate the legal matter covered by section 75(3) of the *Regeringsreglement* (which includes both indigenous and religious law) it fosters misunderstanding.

Is there, perhaps, another indigenous word which means 'law' in an objective sense? Apparently not. There are literary words, such as *rajaniti* in Javanese (from Sanskrit, and actually meaning royal conduct); but even if these meant the same as what we understand by 'law', they would obviously not serve our purpose.

If, therefore, the legal material popularly known as adat is to be defined in such a manner as to include only the 'adats that have legal consequences' (Snouck Hurgronje, 1893:357), and to avoid all confusion with other native interpretations, then the simplest solution would be to speak of 'adat law'. Casually or incidentally this term has been used in an objective (occasionally also in a subjective) sense by various authors: Snouck Hurgronje, Nederburgh, Juynboll, Scheuer. (In most of these sources [5] the term is synonymous with 'indigenous law' to the exclusion of religious elements.) And last but not least, adat law has already been used in a number of official papers.[6] The term is evidently viable and fulfils a need.

[9] Should 'adat law' be accepted, its technical meaning must not, of course, be confused with that of other terms such as 'indigenous law' or 'native law'. 'Indigenous law' has a more restricted meaning, because it refers to adat law minus its foreign religious elements. 'Native law' (in the accepted English sense) again covers a wider field, because it embraces both the codified and uncodified law applicable to natives, and in the Indies therefore also includes any Native Criminal Code or Native Code of Procedure.

Confusion is bound to arise unless the terminology is fixed:

I NATIVE LAW:
- A. Adat Law of Natives:
  - (1) Indigenous Law
  - (2) Religious Elements
- B. Codified Law for Natives

II LAW OF THE FOREIGN ORIENTALS:
- A. Adat Law of foreign orientals:
  - (1) Popular Law
  - (2) Religious Elements
- B. Codified Law for foreign orientals

The use of the term adat law has an even stronger claim to preference because it serves to weaken the notion (already refuted above) that a sharp and rigid line separates legal usage from other popular usage, or adat law from the rest of the adat. The borderline is, indeed, so vague that it is often difficult, and sometimes impossible, to distinguish the one from the other. This problem, for instance, became evident where a human penalty is added to the vengeance of gods or spirits (*pantang, rebu, pemali*) upon the contravention of certain

prohibitions; or where mortal man himself can invoke such a state of *pantang* as regards a thing or action (e.g. by putting up mystical signs in order to prevent entry into a certain forest). It also obtains when a degenerate adat in Java prescribes (—) that a contribution [*10*] (*sumbangan*) made by an invited relative or friend to a wedding feast should, if of any value, be reciprocated at a later date by a gift of exactly the same value and preferably also of the same kind, when a wedding or similar festivity takes place in the house of the donor. If, later, the fulfilment of such an adat gives rise to a dispute or even litigation, it may be difficult to decide whether this is a matter of law or merely of etiquette. And again, there are marriage prohibitions in Java which may be ignored, provided that the appropriate mysterious protective measure (*sarat*) has been complied with (—).

But this overlapping of custom and customary law need not prevent a separation of the two, because in many instances it is easy to distinguish the adats with legal consequences, and to set them apart from adats without legal consequences (such as: the Acehnese adat forbidding men to fetch rice from the granary; or the Batak adat prohibiting initiates to appear in public within seven days after their circumcision; or the Javanese adat prescribing the use of yellow *ketan*-rice on many occasions; or mourning customs everywhere).

As a matter of fact, one will repeatedly find that this adat law contains provisions (e.g. with regard to clothing, the shape of houses, moral conduct) which, in the Netherlands, one would never expect to see classified as 'law'; but if they carry an enforceable sanction, how could this name be denied to them?

To adat law, interpreted in this sense, this study will be devoted. We have already a number of monographs on it; but we lack additional material and co-ordination. Moreover, there is no foreign study which could serve as a model.

If the publication of this book had to wait for the preliminary arrangement of all this material, it would not appear within the next ten years. And in the meantime the men on the spot, who have the finest opportunity of enriching our knowledge of this law, would be deprived of any guide.

(— —)

CHAPTER II

THE ELEMENTS OF ADAT LAW

[September, 1906]

[*14*] The collection of rules of conduct applicable to natives and foreign orientals — which are 'adat' on account of their uncodified state, and 'law' because they carry sanctions — has not been derived from a single source. As with the languages and ethnic groupings, the influence of history is noticeable. Against the Malayo-Polynesian background of the indigenous languages, Sanskrit, Arabic, Portuguese and Dutch words and usages appeared as the result of the arrival of Indian, then Moslem, and finally European, foreigners. Against the Malayo-Polynesian background of indigenous beliefs and customs the imprint of Hindu, Moslem and Christian shapes and shades became visible. Likewise, the languages and customs of the Chinese and Arabs in the Indies were subject to non-Chinese and non-Arabic influences. It was no different with the adat law of these peoples. Here, too, the indigenous Malayo-Polynesian law is still the background of the adat law of the Indonesians, whether autochthones like the Batak, Dayak, and Toraja, or immigrants like the members of the Malayan race. But among the 34 million-odd Indonesians of to-day (—) only a minority estimated at less than 3 million has remained pagan, adhering to an animistic-fetishistic religion (Badui, Tenggerese, many Batak, the inhabitants of the interior of Borneo and Celebes, the people of New Guinea, the Baliaga in Bali, etc.). The majority follows one or other [*15*] of the world's great religions, as can be seen at a glance from the map (not always accurate) of the distribution of religions attached to the *Koloniaal Verslag* of 1896: one million Hindus (Bali and Lombok); more than 30 million Moslems (Java, Madura, Sumatra, the coastal areas of Borneo and Celebes, Ternate, Lombok, etc.); 310,000 Christians (260,000 Protestants and 50,000 Roman Catholics in the Minahasa, Ternate, Amboina, Bataklands, East Java, Central Java, etc.). And so it will also be found that into the adat law of non-pagan natives (—) there have slipped elements now of Hindu,

now of Moslem and now of Christian, origin, or a combination of these elements in areas where Islam has succeeded Hinduism (Central and East Java) or Christianity Islam. Similarly, the adat law of the foreign orientals consists mainly of the popular law peculiar to each group (550,000 Chinese, 28,000 Arabs, 17,000 Indians, Bengalese and others), but here, too, foreign religions have left their mark. Consequently, anyone wishing to investigate the adat law of the present day or that of centuries ago, will, like the philologist and the ethnologist, have to be prepared to strike deposits of foreign origin. It has already been indicated (p. 4) how Indonesian linguistic usage distinguishes between original and foreign elements of adat law by placing the adat of the ancestors on the one side — e.g. the *adat poyang* in southern Sumatra (Wilken, 1891:237, 177) — and parts of the religious law on the other.

All this seems simple enough. And yet here lies probably the greatest obstruction to a straightforward study of adat law, an obstruction which has, in fact, blocked the way to this study until recent years. It can be put in one sentence: it is the wholly erroneous supposition that law follows religion, that the pagan Indonesian therefore has pagan law, the Hindu Hindu law, the Moslem Moslem law, [*16*] the Christian native Christian law (insofar as this may exist) — a supposition which is based on nothing, which is emphatically contradicted by the facts, but which, both in our Indies and elsewhere, has wielded, and is still wielding, its obnoxious influence.

The Dutch East Indies Company was apparently able to stay free from such a prejudice, because the few activities which brought it into the field of adat law give no reason to suspect it of this misconception. According to Mayne (1892:42) the Company [1] in 1707 ordered that the legal usages of the Tamil people of Jafna in Ceylon should be recorded, that is, not Hindu law but Dravidian popular law. This collection was subsequently submitted to, and approved by, twelve 'Moodelliars' or prominent natives, and finally proclaimed as an authoritative law-book under the name 'Thesawaleme'.[2]

In Batavia, in 1750, a 'compendium of the principal Javanese laws' received official approval, but although it professes to be an extract from a Moslem law-book, it appears to be indigenous rather than Islamic in character (*Plakaatboek* VI:14-37). In 1759 the Government of the Indies sanctioned a compendium, composed at Macassar in 1775, of 'native laws at the courts of Boni and Goa, in use from time immemorial until the present day'.[3] Admittedly, the Company in 1754

authorized Freijer [4] to draw up a 'compendium of the principal Mohammedan laws and customs', but this collection deals with the very sections of the Moslem law ('inheritance, marriages, divorces') which had, in fact, largely become operative. Its approbation [5] in no [*17*] way aimed at forcing the Moslem law upon the population, as is clearly revealed in the Resolutions of 1804 and 1805.[6] And in 1768, under the influence of the Company, there came into being the collection of princely laws known as the Cirebon Law Book or *Pepakem Tjerbon,*[7] which also refrains from confounding Islamic law with the law of Moslem natives.

In British India, on the other hand, this misconception was already firmly enthroned during the time of the British India Company by Warren Hastings (1772-85), the Daendels * of that country. When Warren Hastings sets about organizing the administration of justice in Bengal, and also wants to prescribe something for the indigenous law, he provides in section 23 of his 'Plan for the Administration of Justice' of 1772,[8] and later in section 27 of the Ordinance of the Government of Bengal of the 11th April, 1780:

> 'that in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mohammedans and those of the Shaster [the books of Hindu law] with respect to Gentoos [Hindus] shall be invariably adhered to'.

In 1781 this provision, with the addition of the word 'succession', is re-enacted in section 37 of the amending Ordinance of July 5th, and with extensions confirmed in an Act of Parliament of the same year (21 Geo. III, c. 70) with regard to the jurisdiction of the Supreme Court at Calcutta. This Act, having stipulated that the inhabitants should retain the benefit of 'all their ancient Laws, Usages, Rights and Privileges', provides in section 17 'that their Inheritance and Succession to Lands, Rents, and Goods, and all Matters of Contract and Dealing between Party and Party shall be determined, in the Case of Mahomedans, by the Laws and Usages of Mahomedans, and in the Case of Gentûs, by the Laws and Usages of Gentûs'. To this, section 18 adds that also the rights and powers of family elders and family headmen shall be upheld 'according as the same might have been exercised by [*18*] the Gentû or Mohamedan law' (Cf. Ilbert, 1898:59, 253-54, 283,

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* [Governor-General of the Dutch East Indies (1807-1811) and a man whose name has become a byword for ruthless driving power. - *Ed.*]

388-91). In the same manner, in section 15 of his Plan, Hastings had recommended a provision with regard to prescription, with the remark that this was in accordance with Islamic law as well as with Hindu law and 'the legal Practice of the Country'.

With what result? It was gradually being realized that there, too, the adat law of the people is by no means the same as the religious laws of the various population groups (ibid:393f., 402f.). There, too, a little more study began to be devoted to indigenous law in particular.[9] But on this point the administration of justice in British India still seems to cling too much to the old fallacy, and with damaging results. Listen to Mayne's lament (1892:41f.):

> 'It is much to be regretted that so little has been done in the way of collecting authentic records of local customs. The belief that Brahmanism was the law of India was so much fostered by the pundits and Judges, that it came to be admitted conventionally, even by those who knew better. The revenue authorities, who were in daily intercourse with the people, were aware that many rules which were held sacred in the Court, had never been heard of in the cottage. But their knowledge appears rarely to have been made accessible to, or valued by, the Judicial department ... (And yet) what rich materials are available, if they were only sought for.'

It is certainly not surprising that the application by the courts there of Hindu law instead of adat law has proved an oppressive burden for those who seek justice (Van der Lith, 1882:234). And most certainly it serves no purpose to turn to British India, which itself has lost the trail, in order to find out what our own government policy with regard to adat law ought to be (Bl. 1904-5, 121(4): par. 6).

Neither Daendels, nor Raffles, nor the Commissioners-General and Governors-General of the Indies in the first half of the last century [*19*] seem to have followed Hastings' example. Thus Freijer's compendium, renovated by Du Bus with regard to the law of inheritance (ISb. 1882 no. 55) does not displace one jot of indigenous law but has, like the compendium of 1760, only been published 'in order to be sustained when and where applicable'.

But it was to be different — why? — with the framing of the legislation of 1 May, 1848,[10] and also with the discussion [in 1851-54] of the bill on the *Regeringsreglement.* On several occasions during the debate in the House,[11] though only once or twice in the documents themselves,[12] it was evident that Cabinet Ministers and Members

failed to understand the problem, and that they considered the 'religious laws, institutions and customs' of the people to be virtually identical with Moslem or Hindu law. Consequently, instead of placing indigenous law first and the religious element second, the words 'institutions and customs' were placed after 'religious laws', thus following the phrasing of the legislation of May, 1848. The idea was certainly not to provide a new place for religious law in the adat law; it was merely a question of continuing the law in force, as is evident from such terms as 'continuous' in section 11 of the *Algemeene Bepalingen,*[13] (—) and 'ancient religious laws, popular institutions and customs' in [various judicial regulations].[14] But if the choice of name was inappropriate for the existing adat law, this was due to lack of knowledge, and not because a change was wanted. Since then this error has recurred again and again in various shapes.

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[*20*] All these formulations seem to indicate that, in general, unconsidered opinion still regards the adat or adat law of the Indies and the religious laws of the Indies as virtually synonymous, instead of recognizing that indigenous law forms the bulk, and the scraps of religious law merely the incidentals, of adat law.

It might nevertheless be possible that this way of representing matters, although historically incorrect, could be justified on practical [*21*] grounds, on the assumption that the three religious laws had eaten so deeply into the adat law that hardly anything remained of the Malayo-Polynesian law or of the popular law of foreign orientals. But this argument, too, falls down. For in the adat law of Hindu Indonesians, Hindu law is, on the whole, of no consequence, except in connexion with princely government and the caste system. In the adat law of the Moslem Indonesians and foreign orientals no Islamic law applies, except with regard to the administration of religious justice, religious levies, parts of family law, inheritance and pious foundations; and even in these cases it applies by no means fully or universally. Finally, in the adat law of Christian natives and Christian foreign orientals (if these exist) (—) the influence of a possible Christian law can only rarely be recognized, as in marriage law, or in provisions about interest on loans. Also in practice, therefore, the religious laws occupy only a secondary position; and as far as the three million pagan Indonesians are concerned, they do not apply at all.

And yet, at least as regards Islamic law, outward appearances

sometimes suggest a wider sphere of operation. After all, for many aspects outside the scope of the above-mentioned subjects (administration of justice, levies, family law, pious foundations) Arabic-Moslem terms are found in Moslem areas of the Archipelago; right of ownership is *milk* (*milik, milék,* etc.); common property *sarakat*; offer and acceptance *ijab* and *kabul*; blood-price is *diah* (*diat, diët*); and custom itself, *adat*. Does it not follow, therefore, that Moslem law governs also these subjects? A counter question may provide the answer. Our own Dutch legal language is, unfortunately still overburdened with Roman law terminology, such as *reivindicatio, mora, negotiorum gestio, actio pauliana, ab intestato, venia aetatis*. In criminal law one speaks of *furtum usus* and *crimen repetundarum,* in constitutional law of *forum* and *fiscus,* in international constitutional and administrative law of *jus postliminii* and *capitis deminutio*. But who would draw from this the conclusion that we are still governed by the system of Justinian? It is mere learned pretence! We meet with a similar pretence — but more excusable, because an Indonesian versed in holy writings is expected to see the operative field of Islamic law as widely as possible — when [22] terms derived from Moslem law are affixed to common Indonesian legal concepts which for centuries have had indigenous names (such as *bangun,* for blood-money). Such usages are no proof of a wider sphere of operation of Islamic law.[15]

However, although the influence of Islam is restricted mainly to the aspects indicated above, in a few regions and during certain periods, it did go further. For instance, here and there in the native states in the Outer Provinces [i.e. the islands outside Java and Madura], and also in the Principalities of Java, capital offences were taken to a religious court. Further, about 1866 it was discovered (Bb. no. 1835) that the religious court in Lebak dealt with the pledging of agricultural plots. And, according to Snouck Hurgronje, it appeared from fragments discovered in the archives of the old-time *pakih* [principal religious judge] of Banten, that various contracts about transfer of ownership used to be concluded and registered *in optima forma* before the judge or his representative, mainly in accordance with the provisions of Islamic law. In Aceh — again according to Snouck Hurgronje — the number of people who lost their right hand as punishment for theft used to be fairly large, and many of them were exiled to Pulo Wè. Islam has sometimes gained a measure of influence, too, on issues the principal aspects of which remained governed by Malayo-Polynesian law, for instance, the

determination of the amount of blood-money.[16] But the relation of religious and indigenous law is not in the least reversed by such examples; they only serve as a warning that we should no more indiscriminately deny the influence of Islam than others have indiscriminately accepted it.

This secondary, purely incidental, significance of the religious laws for the adat law of the Indies has not only been most lucidly expounded, but (at least for Islam) also fully explained historically by Snouck Hurgronje — casually in his *Mekka* (1888-9),[17] extensively in *De Atjèhers* (1893-4),[18] again in the *Zeitschrift der Deutschen* [23] *Morgenländischen Gesellschaft* (1899),[19] and finally in his *Gajoland* (1903).[20] These conclusions have been summarized in Juynboll's textbook on Islamic law.[21] They also fully conform with what Liefrinck writes about Hindu law,[22] and what Nederburgh vividly and clearly demonstrates [23] in connexion with the implications of section 75 of the *Regeringsreglement.* And all these arguments find powerful support in Carpentier Alting's information on adat law in the Minahasa.[24] In this area there are a few pagans and Moslems, but the great majority are Christian. Does this mean a sharp, triple distinction in adat law, and practically no pagan law? Not even remotely so! It is in the main the old indigenous pagan law that has remained for all people, with the result that the pagan, Moslem and Christian Alfur inhabitants all have virtually the same law, except with regard to the conclusion and dissolution of marriages, which are practically the only matters in which differences occur. Even more significantly, the adat law of the Moslems in the Minahasa, far from being uniform, sometimes shows marked differences, depending on whether these people are of Minahasan or other Menadonese origin, or from other islands. What then, in the face of facts like these, remains of the identification of religious law and adat law?

For no part of our material is an accurate assessment of the relation between indigenous law and the religious elements so essential as for the adat law of Christian Indonesians (Javanese: *serani,* or *kěristěn*; Malay: *serani*). They are found, mostly in small groups in different areas in the Indies: in west, central and east Java, and various Batak areas, in Nias, at Sawahlunto, in Borneo, the Minahasa, Bolaäng-Mongondow (Menado), south Celebes, at Posso (central Celebes), in the Ternatan archipelago, in New Guinea, Amboina, Timor, Sawu, Sumba and Sumbawa — a total of 260,000 Protestants and 50,000 Roman Catholics. Is it necessary to say that, living in areas so far

[*24*] apart and having been converted at widely divergent periods, the Christian people differ vastly from one another? And that there is nothing more dangerous than to label them all with the same tag?

It (—) soon becomes evident that, in order to understand the adat law of the Christian Indonesians, one must first of all ask whether they became Christian after having been pagan, or after having been Moslem. If they were converted from paganism — like the Batak, Minahasan, or New Guinea Christians — then they have *ceteris paribus* retained their old adat law, except for some points which were incompatible with Christianity or ousted by Christian regulations. In this case the pretext that nobody would be able to identify their adat law [25] is simply untenable.[26] But if Christianity has followed upon a few centuries of Islam — as in Java — the problem becomes serious. Islam usually introduces a greater or lesser part of its family law and law of inheritance, and this by means of the administration of justice by Moslem religious courts. Suppose now that a Moslem becomes a Christian. For him the religious jurisdiction in terms of sub-section 78(2) of the *Regeringsreglement* falls away, and henceforth a government court will have to judge disputed matters of family law and inheritance for him. But according to what rules? Already centuries ago Islam must have driven out the greater part of the indigenous marriage law and important aspects of the indigenous [*25*] law of inheritance; but Islamic law does not avail him who abandons Islam. What then can a government court accept as such a person's law of marriage and inheritance if his village by-laws, or the Mission concerned, have failed to formulate a new adat? In this case the court faces a vacuum, and no one knows what law should be applied to the marriage or to its dissolution or to the distribution of the estate. For even assuming that one could speak of a Christian law on these points, (—) this could not indiscriminately be imposed as adat law upon such persons. And though a distinct adat might have developed among a group of Christian Indonesians or in an Indonesian Christian parish, even this possibility can be discarded if the conversion is limited to a few individuals only. The judge might now resort to the shock-treatment suggested in section 75(6) of the *Regeringsreglement* and prescribe a diluted form of western law for the unfortunate Christian litigant; but he then knows for certain that he dispenses a kind of justice which will suit the litigant only in exceptional cases. Some time ago there seems to have been a *landraad* [government district court] in Java which, in desperation over an

inheritance dispute, persuaded the Christian involved to become a Moslem again for the occasion, in order that his case might be decided by a religious court (whose jurisdiction, incidentally, was highly questionable, since the parties did not fall under its jurisdiction at the time the inheritance fell due). After the case he could then re-embrace the Christian faith! The need must have been very pressing if an officer of the judiciary had to resort to such measures. When, in another case, the official of a land-registry in Kediri [central Java] refused to register the widow and children of a Christian Javanese as heirs to his land unless they could produce a certificate from the Moslem 'council of priests',[27] its *penghulu* rightly refused to have anything to do with the matter.[28]

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[*26*] The Missions often know a way out. Church marriages, baptismal certificates, marriages dissolved by church councils, although they admittedly circumvent law and old adat, are acceptable as new adat. In many cases, however, the Missions are unable to rectify existing defects. One need only think of the complications which may arise when a Christian and a Moslem native have a common right to land, or when they jointly lay claim to a deceased's estate. (—) Also, for Christians who turn Moslem, the added presence of religious elements may pose thorny legal problems (Carpentier Alting, 1902, I(1):137). It cannot be denied that there is every reason for wise legislation in these matters, if only to eliminate obstructive rules.

The question perhaps arises whether the relationship between the indigenous and religious elements in adat law deserved such full discussion. But then, see how, even nowadays, many misconceptions on this point exist everywhere. De Louter, in the latest edition of his manual of constitutional and administrative law (1904:476), admits that 'no interpretation of law, based on a Moslem or other foreign source of law, can ever be correct if there is no conclusive evidence of its having penetrated the legal consciousness of the people, and of its acceptance as part of their customs'. But he subsequently (p. 480) speaks of a disregard for Islamic and native legal concepts in the Native Criminal Code, although neither in the Indies, nor elsewhere, are the traces of Moslem criminal law worth mentioning. Kleintjes [*27*] (1903, II:44) admits that 'only such religious laws may be considered as have been accepted by the natives of the country, and as have been developed with and by the adat'. But a moment earlier (p. 43) he had turned this relationship upside-down by demanding

an investigation 'into the extent to which the religious laws had been altered by local customary law, popular institutions and customs'; and elsewhere (p. 55) he protests against the idea that Javanese Christian natives should, in terms of section 75 [*Regeringsreglement*], be subject to 'the Moslem law' (which could never be their religious law) 'as modified by and integrated with local custom'. De Savornin Lohman (1901:431) appears to accept the identity of adat law and religious law, stating that 'for those natives who have embraced Christianity ... the religious laws, institutions and usages which governed them before their conversion, are of no consequence'.

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The Government of the Indies itself, in its commentary [29] on the Native Criminal Code of 1872 (highly deficient on the subject of adat law), repeatedly gives pride of place to the Islamic law as the historical law of the Moslem Indonesians. Court decisions confusing the issue are legion. And on November 24, 1896, the Minister, Kuyper, even taught the Dutch Lower House that 'the criminal law for the [*28*] native was wholly founded on the verdicts of the Koran', whereby he ignored not only the fact that in government courts adat criminal law had been replaced by the Native Criminal Code, but also that, had adat criminal law still been valid, it would not have been Moslem criminal law, and, even had it been Moslem criminal law, it would have had to be looked for not in the Koran but in entirely different books.

In view of all this uncertainty and confusion on a major issue, one might certainly have expected from the Minister a clear statement of the attitude of the Government towards the much disputed constituents of adat law, when he introduced his bill (Bl. 1904-5, no. 121) for the progressive replacement of adat law. But this much is certain: whether due to caution or to lack of perspicacity, both the theory of reception and the opposite doctrine could be read from the voluminous commentaries. As a result the government proposed the retention of the ambiguous phrase: 'religious laws, institutions and customs'.

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Fortunately, in the legislation itself — a better guide than ministerial explications — there are both early as well as more recent symptoms which reveal that, in several fields, the worthlessness of religious laws had to be recognized. [For instance, the words of] sub-section 71(3) of the *Regeringsreglement,* 'Where these provisions ... are not in accordance with the institutions of the people ... they shall not be

applied', show an awareness of the fact that, at least as far as the organization of the indigenous villages was concerned, the religious laws were irrelevant. (—) And such examples can easily be multiplied (see p. 3, above).

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[*29*] But, regrettably, all this is again outweighed by the provision instituting an advisership to government courts of justice. It is a concession to a false conception of adat law, which dates back to the 1st May, 1848, but which has exerted its evil influence to the present day.

What was the legislator's aim with this advisership? He wanted to be certain that the government judiciary, when applying adat law (i.e. the 'religious laws, institutions and customs') as a court of first instance, would have the benefit of advice on relevant points of adat law from a native or foreign oriental. Section 7 of the Judicial Code (a Royal Decree of 1848) provided for such expert advice in the government administration of justice throughout the Indies.

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[*30*] What connexion has this advisership with our enquiry into the elements of adat law? It is this: the choice of adviser prescribed for these cases makes it as clear as daylight how badly the religious laws were confused with adat law by the legislation of 1848.

Before 1901, section 7 provided no adviser in adat law cases involving pagans (—), but the rules of procedure in the Outer Provinces prescribed (unlawfully) the advice of either a headman or a person of the same nationality and religion as the native litigant. In 1901 this provision was legalized and made general. No objections, of course. Before 1901, if the litigant was Hindu, section 7 prescribed no adviser, but sections 11 and 26 of the Bali regulations [30] provided for the advice of the *pedanda,* the Hindu priest. The Bali regulations must have assumed that the Hindu Balinese have Hindu law as their adat law, for otherwise this provision is hard to explain. The wise arrangement mentioned above for pagan natives was, in 1901, made generally applicable to Hindu natives as well; but has this changed or improved judicial practice in Bali and Lombok?

If the litigant is Moslem (by far the most common case), advice is given by a Moslem religious official (incorrectly called a 'priest') or by another Moslem considered to be versed in the scriptures. But should this adviser (in Java he would be the religious judge at the regency capital, who is usually also head of the mosque) have a knowl-

edge of any law at all, it will be of whatever Moslem law he has picked up at a religious seminary or elsewhere. But the kind of case in which Moslem law is applicable is, in fact, taken to the religious court (the so-called 'council of priests' in Java), and not to a government court. Ninety-nine per cent of the adat law cases with which [*31*] a government court deals are governed, however, by the indigenous law. If, therefore, a *penghulu* in Java is called in to advise on adat law, but explains instead the nature of Moslem law — e.g. the Moslem law of sale or of pledging or of cutting off the right hand, as one writer after another has parroted — his advice is worthless. This is not because the judge cannot follow him (—) (in civil cases he may do so, while in criminal cases he has to take note of what the adviser says), but because such advice involves something not contemplated in section 7, which had in mind adat law and not lifeless Islamic school-law. It is as though a judge in the Netherlands, needing to be enlightened on Friesian legal usages, were to be read a passage from the Code of Justinian!

Yet the fault is not with the *penghulu* who must in this situation regard himself as a *mufti* or consultant on Moslem law. It lies with the legislator of 1848, who stipulated the wrong adviser, and with the legislator of 1901, who perpetuated the error. There is a tendency to justify these legislators by imputing to them the wish to have the religious law of the people heard in the court house, as happens in Aceh Major where, in the administration of justice by the *ulèëbalang* (chief), the *kali* or religious judge is sometimes heard as a mere formality (Snouck Hurgronje, 1893:101). But this interpretation is clearly contradictory to both the old and the new wording of section 7, which refers not to religious law, but to adat law as meant in subsections 75(3) and (4) of the *Regeringsreglement.*

And now the Christian natives. With regard to this category the legislator has had to eat the bitter fruit of his ill-considered choice. Had he realized the vast difference between adat law and religious law, he would have understood that an adviser competent to advise on the indigenous law of a Moslem litigant, will also be competent to advise on the identical indigenous law of a Christian litigant. Or, to put it differently, that if the *penghulu* cannot cite the Malayo-Polynesian law of the Christian Javanese he will be equally unsuitable to act as an adviser on the very same Malayo-Polynesian law of the [*32*] Moslem Javanese. But what happened? In 1848, no provision was made for an adviser for Christian natives, and the regulations

of the Outer Provinces never introduced one; in 1891, the conflict between section 7 and some other sections of the legislation was decided in favour of the omission of an adviser for Christian natives (ISb. 1891, no. 230).

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Are these Christian natives then without any adat law on which advice should be obtained? Or are government courts so well-informed that advice would be superfluous? But then, is not three-quarters of the adat law of these natives exactly the same as that of their Moslem compatriots on which the judge is supposed to be so ill-informed? The omission can only be explained by the legislator's assumption that the law for Moslems is Islamic law, a law which, obviously, cannot provide for Christian natives; and that for this reason the adviser on the law of Moslem natives must be unsuitable as an adviser in respect of Christian natives.

After all this, little more need be said about advisers on the adat law of foreign orientals, because here the same misconception is repeated. Before 1901, it was doubtful whether section 7 prescribed a Chinese headman or a Moslem scripturist [*ulama*] as an adviser on Moslem Chinese. In 1901 this question was settled in favour of the Moslem scripturist; and, if one considers that Moslem Chinese easily tend to identify themselves with Moslem natives, this may probably be regarded as a wrongly based conclusion. For Christian Chinese (assuming these are still to be classed as foreign orientals, see p. 17 above) no adviser has been required since 1891. As regards Moslem Arabs (in eleven of the Outer Provinces where the European law of property at present does not apply to all foreign orientals, and where this point may therefore be of relevance) a Moslem scripturist is the adviser, also in matters (law of property, etc.) not strongly affected by Islamic law. For Christian Arabs no adviser was required [33] from as early as 1848. For other Moslem foreign orientals (—) a Moslem religious functionary or a reputed scripturist acts as adviser. So here, too, adat law and religious law have been muddled up.

Is there then no use at all for an adviser on Moslem law? He will conceivably be useful in two cases. First, if Moslem law is applicable, but the matter cannot be taken to a Moslem religious court ('council of priests', etc.) simply because sub-section 78(2) of the *Regeringsreglement* requires both parties to be either natives or foreign orientals of one kind. In accordance with sub-section 78(1) the dispute must then come before a government court, which has to apply Moslem

law as given by the Moslem adviser (—). Secondly, if a question of Moslem law crops up in a government court: for instance, whether someone is an heir under Islamic law (unless it is assumed that such a question should be referred to a religious court); or whether, within the period of recall, a repudiated wife is still a spouse for the purposes of the section dealing with theft within the family.[31] Except on these rare occasions advice on Moslem law serves no purpose.

The existing legislation therefore gives practitioners ample excuse for the fact that so many of them have come to have a wrong conception of the elements of adat law.

On the other hand, it would be incorrect to assume that the priority given to religious law, and the identification of it with adat law, has always resulted from an inadvertent mistake, misconception or error. Honesty requires that the name be mentioned of the man who has defended the viewpoint disputed here with scholarly conviction, and who has expressed his conviction in a series of articles. He is Mr L. W. C. van den Berg (—), from 1878 to 1887 adviser to the [*34*] Government of the Indies on Oriental languages and Islamic law, from 1887 to 1900 professor at the Indological Institute at Delft, and since 1902 adviser on legislative matters to the Department of Colonial Affairs (—). His doctrine is the theory of a *receptio in complexu* of Hindu law by Hindus, of Moslem law by Moslems, and of Christian law (insofar as it exists) by Christians. According to this doctrine, the law of the natives (and foreign orientals) is conditioned by their religion until the contrary is proved, because by accepting a religion they also 'virtually' accept its religious law. If the contrary or 'exception' is proved for one or more subjects (whole institutions or merely subordinate points), such exceptions should be regarded as 'deviations' from a religious law which has been accepted *in complexu*. The founder of this doctrine thinks that his willingness to admit such counter-evidence proves his 'open mind' and his 'unbiased appreciation' for the 'national sense of justice of the Queen's dark-skinned subjects'. In other words, the adat law of the natives (and foreign orientals) in the Indies is not shaped by the indigenous law with occasional intrusions in the form of fragments of religious law, but, to the contrary, by religious law plus deviations! According to the founder of this doctrine, it is 'not even difficult also to point to parts of the Indies where, as the result of extraordinary circumstances, Islam has been almost fully, if not entirely, accepted' (1884:151).[32]

[*35*] (—) Van den Berg has discussed the reception of Hindu law

particularly at the beginning of his treatise on Indonesian communities in Java and Madura (1901*a*:1-140).

The reception of Islamic law has been worked out in [several of his papers [33] the first of] which is a perfect example of a *receptio* consisting of deviations only.

Finally, it seems that the reception of the Christian law must be understood in the surprising sense that Roman Catholic natives accepted canon law but Protestant natives a vacuum (there being no Reformed religious law) — which vacuum may as well be filled therefore with Roman-Dutch law (1887:53). This vexing reception appears to have been denied the benefit of further elucidation.

It may now be asked on what grounds the religious law has been accepted, in these writings, as the 'key-note'. It is based on the author's gratuitous assumption that certain crude similarities, for example, regarding village institutions, or rates of interest, can only be explained as derivations from some religious school-law. Or he assumes that certain categories of Islamic prescriptions, for example, the general principles of the law of obligations, or the rules governing the nature, requirements and consequences of particular contracts, 'have virtually penetrated the legal consciousness of the people' (1897:94). The answer to the question of why indigenous law may be ignored, even though it remains active, seems to be that such deviations from Islam do indeed occur, but do not 'result from a different sense of justice',[34] or are 'a product of individual arbitrariness or ignorance' (1892:455). And should one ask what remains of this reception doctrine with respect to the countless aspects of which even [36] the author himself cannot deny that 'reception with deviations' is evidenced by deviations only, one would only learn that adat law is strikingly similar to Islam in all those major principles — a subject's obedience to his sovereign, no contract without consensus, and so on — which, as it happens, are the same here, there and everywhere (—).

This supposition, according to which ancient indigenous legal usages are 'deviations' from a much younger Islam, finds its most amusing parallel in the habit Moslem sages have of labelling as innovations (Arabic: *bidᶜah,* pl. *bidaᶜ*) (—) old-Arabic practices which survived Islam. Certain Moslem (above, p. 12) or Hindu words (e.g. *deça,* territory, associated with the Javanese *désa,* village) which have become fashionable sometimes serve the purpose of the reception theory. Well considered, however, they no more prove the operation of the religious law than the use of *litterae patentes, Concordia res*

parvae crescunt, and *armamentarium Hollandiae* proves Roman influence on the Dutch Republic.

It should further be noted that this theoretical structure has two other peculiarities. First, it is wholly framed in the style of Justinian: just as the legists of the late Middle Ages (and after) squeezed our common law into the matrix of Roman law, so the completely unsuitable form of Justinian's and the French codes has been chosen as the only conceivable frame for 'juridical construction'. And secondly, out of 'sloth and sheer idolatry of law books' (Snouck Hurgronje, 1893:19), the material for the indigenous law has largely been lifted from native codes and law books such as Der Kinderen used to flourish, from princely edicts or legal treatises which introduce or recommend new rules rather than describe the existing adat, that is, from books which usually had only a very limited and ephemeral influence on the living adat law, or no influence at all.

[37] The result of this theory of reception, of this Roman systematization, and of this trust in native law books, is that adat law, as construed by Van den Berg, is worlds apart from real adat law, and there is no shadow of doubt that no Indonesian would recognize his own law in this construction.

But the reception theory has repeatedly — one might say, everywhere — been disputed and refuted, in particular by Snouck Hurgronje, Piepers, Nederburgh, Bergsma (of the agrarian investigation in Java), Van der Lith, and, in passing, by Van Ossenbruggen and the American scholar Clive Day.[35]

A subsequent effort by Van den Berg (1897:83-84 *n*) to explain away the difference in principle between his ideas and those of his opponents — a difference which, in the beginning, he considered to be 'of great importance' (1895:309) — naturally missed the aim (—).

If the purport of this chapter on the elements of adat law had to be summed up in a few words, it would be this: the vast bulk of adat law is still the indigenous Malayo-Polynesian law, and there is a question of religious elements only in the areas, for the issues, and in the measure in which this law has been changed or replaced by Hinduism, Islam or Christianity.

There is, however, a final warning: sometimes, and then in entirely different ways, religion may have exercised a profound influence on the adat law of natives or foreign orientals. A Dayak of Borneo who embraces Islam will for this reason be accepted as a Malay by the

Moslem Malays of this island, though they may have not a drop of blood in common; and as a consequence he will sooner or later become [*38*] subject to their adat law. A Chinese in the Indies who becomes Moslem will for this reason be absorbed into native society — regardless of whether his kin have been living for generations in the archipelago or whether he has freshly arrived from his homeland — and after a generation many will be ignorant of his origin. He comes gradually under the sway of the adat law of the natives, or at least, he drifts in many respects away from the law of his compatriots. The Mission in northern Halmahera, by managing to bring the roving population into villages to facilitate evangelization and education,[36] has thereby made a great change in their life and created new legal needs.

A Christianity that 'cometh not with observation' * may also in the archipelago gradually bring about the renovation of law which Fustel de Coulanges so strikingly described in the fifth book of his *Cité antique.* And yet even in these instances the constituent parts of adat law do not make way for religion; religion is, however, one of the factors determining the kind of community to which a person belongs, or the conditions of life and the impulses at work in it.

* [Cf. Luke 17:20-21, King James Version.]

CHAPTER III

THE STUDY OF ADAT LAW

[June, 1907]

Tandem bona causa triumphat

[65] It would have been of incalculable value to us if, in our earliest possessions in the Indies — the Moluccas, Java, the coastal areas of western Sumatra — the field of adat law had been reconnoitred and recorded when it had still hardly been maimed or influenced by European rule, for this would have benefited our understanding of present-day adat law and our knowledge of the old adat law. Adat law is not, as has been assumed only too often by Europeans, something immutable, though changes in it are not normally visible within the period of observation granted to a single observer. On the contrary, it has been confirmed from various sources that 'local usage . . . gradually adjusts itself to changing needs' (Snouck Hurgronje, 1894: 353); that the adat 'changes with the generations', and remains static 'for hardly a single moment' (1893:9-10); that 'the passage of time and contact with neighbouring peoples make deep inroads upon it' (Willer, 1846:6); and that 'however invariable the character of adat law may appear to be, it does in fact adjust itself to changing conditions, though gradually, and therefore slowly, with the result that this [process] almost escapes observation, unless suddenly an opportunity presents itself to cast an eye upon the situation of a century ago' (Liefrinck, 1890:338). It is therefore a fallacy to assume that the 'native adat is an unchanging whole, not subject to the laws of history' (Bb. 5941/1902). The sophisticated Indonesian is [66] aware of this gradual change, and among the Minangkabau — according to information from Van Ophuysen — an adat maxim (*papatah*) says:

> *Sakali air* [*aie*] *gadang, sakali tapian baranjak,*
> *Sakali rajo baganti, sakali adat* [*adaik*] *barubah.*
> If the river is in spate, the washing place is shifted,
> With a change of rajah comes a change of adat.

Knowledge of the adat of olden times might therefore have been of great value to us, but the material is extremely scanty. Here and there an odd piece can be found, such as Padt-brugge's description of the usages and customs of the Alfur in Menado (1679), the report by Rothenbühler on conditions in the region of Surabaya (1812), and others like these; for the rest accounts of travels can be consulted, and historical accounts. But the harvest is far from rich. On the history itself of adat law nothing or hardly anything has ever been written. He who seeks to find out about the history and development of this law will have to be satisfied mainly with the legal rudiments which have survived as archaic relics to the present day, or must rely on comparisons with what is nowadays found in less developed areas.

But even our knowledge of the present state of Indonesian adat law is poor. Hence the numerous reputed jurists — especially in Java — who on the basis of their experience blithely maintain that such a thing as adat law, at least of the indigenous population, exists only in the imagination of a few interested people. This verdict need not, in itself, be taken as a serious reproach. After all, the study of indigenous languages, too, is scarcely a century old; and many of these languages have hardly been explored. How then could one explore the adat law of a people whose language or dialect has not really been mastered? However excusable this neglect, it is none the less dangerous, especially because here, if anywhere, unknown means unloved. Until recently it was taken for granted by jurists in Holland [67] and the Indies that, if the law of the natives or foreign orientals had to be improved, it should be replaced by western law — the only genuine law. The whole attitude of [the parliamentarian] Kappeyne during the discussions on the [proposed] *cultuurwet* [1] is one of insistence that that homely collection of adat rules, which even upon examination would remain obscure and unknown, be exchanged for the pure and sound rules of Roman law and of our present private law, rules which have 'stood up to the test of centuries' and which 'are the joy and practice ground of the most eminent intellects'.[2] [In the debates on the agrarian bill in 1868] Minister De Waal, recalling the opinion of Van den Bosch [1832] that the positive European law should not be regarded as the only expression of equity and justice, ascribed to the legislation of 1848 and 1855 a 'somewhat contrary tendency'. According to him, therefore, the native to whom the European law is made applicable, or who voluntarily subjects himself to it, would thereby acquire 'a better private law' (Bl. 1868-69:1044f.).

A few years later again, in 1871, the government of the Indies let it be known (Bb. 2491) that, according to the spirit and letter of section 75 of the *Regeringsreglement* [1854], the European private law is 'the standard and measure of law', 'not only for Europeans but also for the indigenous population'. In 1873, advisers to the Netherlands Indies government thought up a plan (foiled by the Governor-General and the Supreme Court) to prepare the whole of the European civil law to fit the native population (Bl. 1904-5, 121(4) and (9)).

De Louter, in the fourth (1895) and subsequent editions of his manual on constitutional and administrative law, writes that, 'Legal uncertainty (in the Indies) can only be removed by a cautious but steady extension of the rule of European law'. (—) And as late as 1901, one of the contributors to the journal RNI (Hubregtse 1901: 482f.) stated that in the Indies the European law reflects what the legislator himself 'regards as the law', while adat law represents only the permissible exception, based on a strict interpretation and tolerated only until such 'concession' can be withdrawn 'without serious [*68*] objection'. Who can hope to find among such people the conviction that adat law is worth studying, that it is virile and capable of future development? We are rather reminded of the un-linguistic trend — repeatedly revealed in the *Staatsblad* [Gazette] of the Indies, especially in the old issues — to have all indigenous languages conveniently replaced by Dutch or Malay, or preferably kitchen-Malay!

The inference to be drawn from these remarks should be clear. Whether adat law serves a useful purpose or may ultimately become useless, or whether European law meets or will meet the requirements of the natives, are questions we have not yet considered. We have only pointed out that people ignorant of adat law have time and again, and without using any standard of comparison, arrived at the preconceived conclusion that only European law could be fully-fledged law, and that adat law must of necessity be inadequate and inferior.

Probably the greatest progress lately made in the field of adat law is the realization of how much the usefulness of western lawyers' law depends on time, area, and people; how, for instance, the Minangkabau of the Padang highlands, prosperous under their adat law, could be reduced to poverty under European law. Savigny taught this a long time ago, but the lesson seems to have been forgotten. Why? Snouck Hurgronje expressed it strikingly (1886*a*:98-101): like the theologians of the past, who did not look for the substance and history of the various religions but instead sought the right and true religion, the

jurists did not look for the substance and history of the various legal systems but instead sought the right law, the perfect law. Obviously this law could not be far removed from the only two legal systems they knew: the *jus romanum* and *jus hodiernum*. It follows that adat law could be disposed of with the dogma that, however meritorious it may once have been, it no longer fitted into 'the framework of requirements of our time'.

But now a missionary who, without knowledge or investigation, [69] summarily demands 'the Dutch laws of inheritance, land ownership etc., etc.' for the Minahasa, is told by Carpentier Alting (1902:46) that he 'shows evidence of having learnt extraordinarily little about the adat law prevailing in the Minahasa'. Fifteen years ago he would probably have ranked as a sound adviser.

To whom do we owe this change of attitude? Should the name be desired of the first person who strongly advocated and stimulated the study of adat law, it would be Van der Lith, a professor at the University of Leiden who, in 1882, published a valuable paper on the attitude of the colonial legislator towards European and native legal concepts (Van der Lith, 1882:193-242). But deeds are even better than words, and when speaking of deeds, two other names must be mentioned. Wilken (1847-1891, see Enc. N.I.), with his undisguised preference for topics of ethnological jurisprudence, directly served the cause of adat law by his careful arrangement of data on indigenous adat law in several of the Outer Provinces (especially Sumatra and the Moluccas). His premature death has been an irreparable loss. Snouck Hurgronje [1857-1936, see Van Vollenhoven, 1928] has done equally essential but far more difficult work, both in his invaluable assessment of the significance of Islam in Indonesian life and popular law, and through his revealing publications on the customary law of the Acehnese and Gayonese. The value of his work can to some extent be appreciated when one inquires how many Hollanders would have been able to understand and describe so thoroughly community life and Christianity among the fishermen of Noordwijk or the farmers of Brabant, or life and religion in the Jewish quarters of Amsterdam. It is a work in which the artist's gift of identifying himself with alien conceptions and modes of life is as clearly expressed as in the most forceful writings of Zola.

At that time, and earlier, officials in the Indies administration (Wilken originally was one of them) and others did contribute to our knowledge of adat law, for example Van Bloemen Waanders, Koore-

man, Riedel and Liefrinck. But Wilken and Snouck Hurgronje mark the beginning of the era of deliberate and scientific exploration. They found fellow-workers and followers both among those who, like Neumann, De Waal van Anckeveen and Van Eerde, wrote from personal observation; and those who, like Brandes, Hazeu and Rouffaer, [*70*] worked from books and documents. But what about [academically trained] lawyers? There were the observations in the field by Van Bosse (Minangkabau) and Carpentier Alting (Minahasa). Fromberg could be mentioned for his studies of published data on the Chinese in Java; Van Ossenbruggen for comparative jurisprudence gleaned from books; and Nederburgh for introductory work. Van den Berg has already been mentioned (pp. 20-22). But with these five names, the list of those who published their knowledge is complete. And this while so many fields lie ready to be harvested, while it is of immediate practical importance to lawyers in the Indies to collect information on adat law; and while Islamic and western law are known to be on the watch for suitable opportunities to swallow even more slices of indigenous law!

How can this mental lethargy be explained? It is not enough to say that many lawyers are overwhelmed with work; for those who did manage to find time for other things rarely devoted it to adat law.

The first explanation lies in the calamitous notion of old that the adat law of the Moslem natives (90 % of the population in the Indies) consists of 'Islam plus deviations' (Chapter II), of which Islamic school-law represents the proper and important rule, and local legal usage only the unseemly and wild-growing exception. Even the professor who attacked this heresy in 1882, did not teach his students Indonesian adat law, but Islamic law. (—) Only very few went so far as to study the indigenous law of the Indonesians or the popular law of the foreign orientals on their own initiative.

But the real reason lies deeper. It is to be found in the circumstance that it is possible to become a 'doctor of laws' by knowing much about 'the two legal systems' (present-day Dutch law and the private law of Justinian), but without an inkling that law is a historical phenomenon, with countless complexions, and developing according to certain rules. In several of our universities even Roman private law and general jurisprudence are taught solely as preliminaries to the study of present-day Dutch law, so that even this opportunity of [*71*] acquiring a historical perspective of law is lost. The result is that legal specialists of all descriptions, company liquidators, defence coun-

sel, and so on, though graduated, still have no idea of or interest in the study of anything other than a refined law like that of western Europe. After the merciless though understandable reproaches by Snouck Hurgronje (1886*a*:101f.), Van Ossenbruggen (1902:6*n*, 73*n*) and Steinmetz (1903:1225f.), we can only hope that within reasonable time at least one of the chairs of law in the Dutch universities not devoted to present-day law will be converted into a chair for comparative law, and that in due course this subject may become part of the regular curriculum (—). The worship of modern law and the identification of the science of law with practitioner's know-how, will then soon enough die a natural death.

Is this field still unexplored and unreclaimed? Fortunately not. Especially during the past thirty years much has been done by the so-called ethnological-juridical school in the way of preparation for a genuine historical and comparative science of law.

Post and Morgan may be mentioned as the pioneers of this school. While the former in his earlier writings since 1872, for instance, his *Bausteine für eine allgemeine Rechtswissenschaft* (1880-81), still appears to display the colourful variety of customs and legal usages in a purely ethnographic fashion, Morgan in his *Ancient Society* (1878) more clearly reveals the ethnological aim of showing that the evolution of law and custom is related to successive stages of human progress, from savagery to civilization. In later years, Post (in his *Grundriss der ethnologischen Jurisprudenz,* two vols., 1894-95) has tried to build a framework within and around which the legal history of less developed societies could be fitted by means of monographic investigations. [72] Kohler, particularly through his numerous articles in the *Zeitschrift für vergleichende Rechtswissenschaft* (since 1878) has helped to supply, systematize and arrange information. (—)

As a follower of this school in the Indies, Wilken must be mentioned first — see his inaugural address on the usefulness of ethnological studies for comparative jurisprudence (1885) and the peroration at the end of his comparison of oriental and western legal concepts (1888:138-40). Among the younger adepts there is, as regards adat law in the Indies, Van Ossenbruggen, who has distinguished himself with his studies of testate succession and guardianship (1902), of the Chinese law of inheritance (1904) and of primitive concepts of land ownership (1905).

What is this school and what are its aims? It is, though in a manner different from the historical school which preceded it, a reaction

against the tyranny of lawyers' law. It aims at research into indigenous law, such as that of the aborigines of Africa, America, Polynesia, India, Japan, etc., which is still extant but which is in danger of degenerating and disappearing, and it wants this research to be done in conjunction with an effort to reconstruct the popular law of the misty past of such peoples as the ancient Egyptians, Greeks, Arabians and Teutons. It needs this research if it is to discover the line of legal development in the past and present. It could then put forward another conception of law than the rationalistic interpretation of code-minded lawyers, the dominant majority of whom seek to ascribe everything solely to the conscious human will. The new view, on the one hand, sees law as having been to a large extent grown unconsciously, and, on the other, draws special attention to trends of social development additional to the lines of national development already indicated by the historical school.

It can be seen at a glance that the ethno-jurists' field of study, with its archaeological border provinces, does not come anywhere near to covering the entire realm of jurisprudence even when the field of study of the code-minded lawyers is added to it. For there is history and a course of development in various kinds of law which not only fall outside our legal codes, but outside ethnological law. The whole of the medieval and pre-modern law of Europe; the law of England, [73] the United States, and South Africa, with their striking courses of development; and particularly also international constitutional law (half of the Law of Nations), the growth of which is equally remarkable. The historical study of this kind of law — a rich effort which deserves all praise — has usually been confined to statements of historical facts, and has but seldom matured to the point of exposing a process of development. Judging from the flimsiness of Meili's partial effort (1898) to make an 'inventory' of the literature on the divergent present-day legal systems and their provisions concerning private law, the time is not yet ripe for a preliminary review of all law that exists, or has existed, on earth. Nevertheless, it should be kept in mind that the science of law is not the study of isolated bits and pieces, but the comprehensive and comparative historico-geographical study of all law, old and new.

Meanwhile, Indonesian adat law lies precisely within the field of study chosen by the ethnological school. We may therefore, without answering the question of whether this school meets all the requirements for the study of law, take a closer look at its merits and

shortcomings to date, which also determine the value, or lack of value, it has for the study of our adat law.

Its merits are immediately evident. In the first place, it provides a miscellany (—) of everything under the sun that may serve its purpose. Considering nothing too insignificant, it gathers material by the armful. Further, it already brings some order in this jumble, either by sorting out the law of the lower and higher species of jural communities (kin communities, territorial communities, principalities, etc.), or by arranging the material according to subjects (inheritance, criminal law, etc.). Finally, through what it exposes in connexion with primitive laws of kinship and marriages, and the emergence of monarchical forms of government, etc., it makes highly necessary corrections in the legal picture conveyed by ordinary biblical history, in which the family life of the patriarchs, the origin of the thirteen tribes, the kingship of Saul, are described as modern matters draped in an ancient cloak.

[*74*] And yet, however significant and evident the merits of the ethnological school, its shortcomings tend to make one say: our thanks for what you have brought, but from now on we must find another way.

Its first fault is to be uncritical of its material. This, obviously, largely depends on the particular worker. Wilken, for instance, makes at most only cautious use of the vague tales told by casual travellers, but even he fails to sort out ripe and unripe in his hunger for information. A man like Kohler, on the other hand, in spite of his great merits, shows so little self-discipline that, when Snouck Hurgronje points out to him (1886*a*; 1886*b*) that he has used the wrong data for the law of Islam, he recklessly counter-attacks (Kohler, 1886; 1887), and even nineteen years later (1905) castigates, the man who dared to know better. But although the magnitude of this shortcoming may depend on personal factors, the fault itself is inevitable in a school that wants to collect material from all parts of the globe simultaneously, not only to store what is being found, but to draw striking parallels immediately.

A second fault, which again results from casting the net too wide, is that of hopelessly mixing up living law and school-law. Even the pioneers refer time and again to Hindu and Moslem law without sifting out absorbed elements of living old-Indian or old-Arabic law and casting aside what is merely dead school-law. In the same amateurish manner, Ezra's Code (from the Pentateuch) or the Code

of Hammurabi have been cited as the living law of ancient times. Even fragments of biblical stories, for example Ruth, or parts of Genesis, are offered as evidence about the time in which they are supposed to have taken place; or Leist's hypothetical descriptions of so-called old-Aryan law are used as sources of ancient popular law.

A third weakness is one which so easily occurs with superficial knowledge, i.e. similarities and parallels are discovered which, upon [75] closer examination, exist hardly or not at all. It is not unusual for the authors of the ethnological school to accuse one another of this weakness, but each suffers from it. The most serious error in this respect is the supposition that everywhere development has been substantially uniform. For instance, territorial communities (district, village) are made to succeed genealogical communities (clans, etc.) and the centralized state (principality, etc.) is supposed to have succeeded the territorial community. But who guarantees that this sequence which, perhaps, the Jews, Romans or Germans have experienced, is to be found everywhere? The development of kingdoms out of territorial communities, for instance, finds no support in the Indonesian archipelago: here we found, or find, either foreign kingdoms (the Hindu states in Java or in highly developed Bali), or genuine indigenous principalities (e.g. in the Bataklands and among the Minangkabau and Timorese) which, however, show less resistance and virility than the foreign states.

And the final weakness of these authors is their uncontrollable urge to trust their wings too early. They immediately want to know the origin, the explanation and the relationships of the observed phenomena, and Darwinian slogans serve them as passwords. Infant sciences like sociology (—), comparative ethnology, and even socio-ethnology, are lifted from their cots and taken out of their diapers to help build a castle-in-the-air overnight. Nobody ever seems to have heard of an *ars nesciendi.*

The result of all this is anybody's guess. The opus as a whole is praised by many. But experts on specific aspects of law repeatedly report that, on their particular subject, the conclusions of the ethnological school are either worthless or unreliable. Among other things it must be noted that in its jurisprudential revelations this school is too much inclined to neglect what should have been a cardinal aspect: the particular composition, shape and frame of the legal rules, and the matrix in which they fit at a certain time and in a certain area.

In Post's *Grundriss,* as well as in Meili's work, it is in particular

this framework that is poor. As a result of this deficiency these books [76] will never provide the scientific cadre for which their authors had hoped.

How then can matters be improved? Taking Post's *Grundriss* one will find that the phenomena of ethnological law are mentioned in the text, while footnotes point out how these phenomena occur among the most widely dispersed races and areas. It is explained that in the field of law, as everywhere else, the same conditions produce the same results. Imagine such a method in philology or theology! All people equipped with the same speaking apparatus of identical physiological construction, all people equipped with an identical thinking apparatus; hence, all linguistic and religious phenomena *a priori* geared into identical connexions and relations. Is this the way it is done in these sciences, which in the nineteenth century have made so much greater strides than our science of law? Do these scholars forget, for instance, that the change from one sound to another can result from a variety of causes, and that a striking similarity of linguistic forms, found in different language families, does not yet warrant any conclusion about their historical development?

It may be argued that this is a lame comparison, because in languages and religions the facts compel us to recognize wider or smaller groupings: Indo-Germanic, Semitic, Malayo-Polynesian languages; Mesopotamian, Egyptian, Teutonic religions. But why should the classification of legal systems be different? If it is impossible even to-day to measure English constitutional, administrative and private law with a continental gauge, what can this mean but that the English law represents a distinctive law stock or law family? Must not some legal systems have originated from the principle of mother-right, while others show not a trace of it? The method, therefore, which is taken for granted in studying languages and religions, seems equally obvious for studying law. There is, furthermore, the consideration that one can no more study the religion of a people without understanding its language, than study its popular law without knowing the vernacular. Wilken started to learn Arabic late in his life in order to investigate [77] Arabic usages and customs. It has undoubtedly been of benefit that at long last, after so many years, people have started with some superficial collecting and classifying in the field of legal ethnology. In the future, too, it will be necessary for each to keep in touch with the work of others, and the task of summarizing findings must not be neglected. Yet it would be wise — as Snouck Hurgronje pointed out

to Kohler in 1886 — not to study the law of half or all the world, but to concentrate on such law groups as one can command.

Who will indicate what these law groups are and determine this 'plan of selected areas'? There will be little objection to taking the language groups as a starting point, although language groupings, ethnic groupings and law groupings certainly need not coincide. The adat law of Russia, of central Asia, of China, India, northwest Africa (the Maghrib), central Africa, and of the Red Indians, etc., alongside that of our archipelago, may then for the time being be regarded as distinctive law groups. With regard to each of these law regions an effort should be made to examine not only the state of adat law, but also its historical growth and the nature of its distribution. Each *law region* [3] (e.g. our archipelago) should be divided into a number of *law areas* (e.g. southern Sumatra, Bali plus Lombok), and most of these law areas again into *law districts* — each with its district law or law dialects. And one should never presuppose that the shape and development of law will be the same everywhere. In the one law district or law area the course of law may have run from *a* to *b* to *c, d,* and *e,* while in another it may have been from *a* to *b* to *f, g* and *h*; in the one this flow may continue in a permanent bed, while in another it may be doomed to run dry.

Does the law region indicated for our archipelago coincide with what constitutes the Dutch East Indies? The term 'Indian archipelago' usually has a wider connotation than this, and is therefore avoided in the more recent ordinances (—). But the law region here referred to certainly embraces, in addition to the Dutch East Indies, the Straits Settlements, British Borneo, Portuguese Timor, the Philippine Islands; and probably the whole of New Guinea (if, at least, Dutch New Guinea may be considered to belong to this region); and it may perhaps also [*78*] include Madagascar. The reason why, nevertheless, this study will be confined to the Dutch East Indies is that the adat law must be seen in conjunction with the rest of the law (above, p. 3), and that at this stage it would make matters too difficult and complicated if western influence and government law in the other colonies also had to be considered.

It can be seen how fine a thing the study of Indonesian adat law becomes as a contribution to the comparative history of law on a global scale. The Netherlands are also in this respect privileged by their colonial possessions. The value of the study of adat law is therefore not restricted to its usefulness as regards legal practice and

administration in the Indies. But it should also be noted that this study would lose its attractiveness if the doctrine refuted in Chapter II were to be accepted, and instead of searching for different law areas one were to assume the presence of a single religious law (Islam) plus a number of more or less significant deviations. It would then no longer be a matter of principle to distinguish law areas in the archipelago, or even to distinguish law groupings within the Islamic (and Christian?) world over the five continents; there would then be nothing left but to divide the law of our East Indies into four parts: the law of the pagan, Hindu, Moslem and Christian areas.

In spite of what has been written above, it is unfortunately wrong to assume that thirty years' activity by the ethnological school has succeeded in destroying the fallacy that only modern law and the Code of Justinian are of real value to the study of law and the administration of justice in the Indies. (—)

[The knowledge of adat law is still very incomplete, and there is but a poor understanding of its internal structure.]

[*82*] A half-dozen government measures seem to be desirable, possible and opportune:

First: publication of materials which can be supplied from case records in government and indigenous courts, but which often remain undisclosed. Besides the scanty adat decisions which have been published in the *Indisch Weekblad van het Regt* (from 1863) and *Het Regt in Nederlandsch-Indië* (from 1849), important judgments known [*83*] to no one but the parties concerned come to light every now and then, sometimes quite accidentally (—). The more legal rulings on adat law gain in significance as the result of better adat law studies and fewer transfers of qualified judicial officers, the greater the benefit of publication will be. For this reason the Secretary for Justice has done an excellent thing by proposing, in his circular letter of 9 August, 1904, to start a collection of adat decisions. Presumably no great results can be expected in the first few years, but in the long run — provided the letter is not filed and forgotten — it could be of real value. (—)

Second: publication of such adat law material (preferably carefully sorted out) as may be found in administrative reports and other papers in government archives. (—) A dual purpose would be served if such publications could be related to the *Memories van Overgave* [4] (—), of which the journal of the [Dutch] Geographic Society gave the most recent example (Schaap, 1907:28-56). If these *Memories* could

be arranged in the form of regularly reprinted booklets, giving [*85*] information on conditions, including adat law, in each region — something along the lines of the district Gazetteers in British India — not only science, but future administration, too, would greatly benefit. But they would have to devote more attention to adat law than their Indian models, which usually remain silent on this point. It would, at any rate, be of some use even if they only mentioned where manuscripts with information on specified topics of adat law are to be found.

Third: guidance to those who will come into contact with adat law, in order that they may become sensitive to this law. For academically qualified judges in the Indies, adat law has already been made a part of the syllabus by the University Education Act of 1876. For future administrative officers, however, the government appears to have rejected this subject even in a new training scheme (—), although these officers will later often have to do research into indigenous law, especially in the Outer Provinces. For Indonesian members of the judiciary the government has, in the bill providing for a Native Law School at Batavia (Bl. 1906-07, 178), recognized the value of this study by a decision in favour of tuition in 'popular law, in particular Native family law and inheritance, Native land rights and Native contracts'. The 'education of juveniles in the manners and customs, laws and religious concepts of the Javanese' (*Plakaatboek* XV:295), which Daendels seems to have favoured in 1808 (—), will probably find no supporters. But no matter what comes of the proposed Native Law School at Batavia, it would be no luxury if, in the three schools for Indonesian administrative officials in Java, and in due time also in the school for chiefs at Tondano (Minahasa) and in the training course [*86*] at Fort De Kock [western Sumatra], the pupils were to be given some idea of the adat law of the area in which their school is situated; because at present their judicial diet consists only of the principal chapters of the codified law for the Indies (Bb. 5516). A knowledge of adat law would also be welcome to future missionaries, if this could be fitted into their curriculum. (—)

Fourth: the government will have to regard researches into adat law as part of the official duties of civil and judicial officers. Enough remains to be done after the investigation into land rights in Java and Madura and the similar, as yet incomplete, investigations in fourteen of the twenty residencies of the Outer Provinces. Completion of this agrarian study, investigation of native forest rights in Java, continuation

of the valuable research done by Carpentier Alting on native adat law in the eastern archipelago — in short, wherever the right man for the job can be found, the study of the adat law (as a whole or in parts) must be undertaken if we do not wish to remain saddled for ever with our present ignorance. (—)

But where should such an investigation be started, and how and by whom?

Certainly not everywhere in the archipelago at once. An investigation of one law area after another was already advocated in 1882 by Van der Lith. (—)

[87] The selection should be made with care, for the choice of the first areas is not unimportant. Adat law is, of course, purest, and therefore most instructive and comprehensible at places where rule by alien kings or governments and world religions have never penetrated, and where the concentrations of people have remained small, isolated and scattered. (—) That is, in areas like the heart of Borneo, or the Toraja territory of central Celebes. The adat law of Minangkabau also deserves priority on account of its completeness and the logical connexion of its components (Kooreman, 1901:145). In all principalities it should always be remembered that the adat law of the population need certainly not be the same as that of their overlords. Java, where adat law has been worse conserved than elsewhere as the result of monarchical rule, our system of compulsory cultivation and the administration of justice by European jurisprudents, seems least desirable as a starting point. But considerations other than purely scientific ones will probably also have to be taken into account in selecting the first areas.

For the manner in which adat law should be investigated no general rule can be laid down; but there are a number of warnings and recommendations which may be of value for the whole archipelago. To begin with, it would be wrong to expect a full knowledge of adat law among the few educated Indonesians one chances to meet. Willer's experience, described in his collection of Batak laws and institutions is instructive:

> '(I found) that the Battah, like all other native islanders, are usually able to enumerate all the particulars of a case with the most painstaking and circumstantial care, but hardly ever know how to draw a general conclusion from a number of cases. Further, no one nowadays knows the "whole" *hadat,* but information on parts of it may be obtained from this or that person

> [*88*] insofar as tradition or his own experience had enabled him to get acquainted with a particular aspect of it. Finally, many are able, with regard to a recent incident, to explain the rules applicable to it, but even the most proficient are unable to give a complete exposition of any category of laws; on the contrary, a great many well-documented examples are needed to throw light on every point.' (1846:2f.).

What Willer found the time to write, conforms with the experience of others who did not write it up.

A second difficulty is the urge, whether innocent or not, of indigenous adat experts to air their learning (above, p. 4; Snouck Hurgronje, 1893:49f.). Often native chiefs will give a neat report on adat law as it ought to be observed according to their own views. But when asked whether it really happens in the way they say, they admit that they have never witnessed a case like that. One should therefore take care to ask what actually takes place in practice, and not how it could or ought to be.

But even though the indigenous source of information may be insufficient and erratic, one cannot do without it. Often research becomes fruitful only when one has the good fortune to come across capable and unsuspected people who provide the kind of information on which — after careful testing and comparison — one can really build. Snouck Hurgronje (1903:XII, XV) has done it this way for the Gayo, Nieuwenhuis in Borneo (the old woman, Usun, in Tanjong Karang), De Groot in South-China, Westenberg among the Karo-Batak (the old man, Pa Pelita). It should be mentioned here that the manual for the regional welfare enquiry in Java and Madura (1904) states on page 1 that it is 'very desirable' to hear what the common man has to say, 'provided this is not done at public meetings', an advice contrary to that given by Van der Lith (1882:241), who recommended getting the villagers together. Knowledge of the informants' colloquial language is, of course, essential. Questionnaires with explanatory examples will probably give a lead in investigations, provided they [*89*] avoid asking leading questions. By sending draft-papers on adat law to local civil officers and judges, as was done with Wilken's essay on family law and inheritance in Southern Sumatra (1891:150f.), one may prevent much adat knowledge remaining in the heads of these officers without profit to others.

In all this research the effort must be made to understand and describe adat law in such a way that the people themselves recognize

in it their own legal usages, without taking it for an alien juridical concoction. One should, in particular, resist the urge to insist upon technical precision, because only too often such precision, whether on points of law or in native ideas about measurements and so on, is really lacking (Snouck Hurgronje, 1903:318f.; 1893:282).

To whom should such research preferably be entrusted? To academically qualified jurists — this is the main question — or to administrative officers?

Jurists will be mistrusted. Western legal learning, so it will be said, is book knowledge, and primitive popular law is a far cry from this. They will breathe into it Roman and western wisdom, which here becomes absurd (—). But would a similar argument be valid in linguistics? — that the languages of Sangi or Toba 'do not belong to the field of linguistics, because they have no supine, no aorist, no state construct, no atmanepadam'? Of course not, because for linguists, trained to detect significant features, with a sharp eye for lacunae and with the ability to adduce comparative material, such expertise is indispensable, particularly in these unexplored domains.

Admittedly jurists who are mere *juris romani atque hodierni periti* are no better suited for the study of adat law than classically biased philologists would be for such a linguistic study. But is this a reason for disqualifying all legal scholars?

[*90*] The observance of prescribed rules and the operation of sanctions require close attention; the various subjects must be systematized in such a way that no important aspects are neglected; there is the relationship between adat law and government law, and the discovery of striking parallels between the primitive law of the archipelago and that of other places or of bygone times. There may be noted philologists and ethnologists who can do this better than many jurists, but this does not necessarily make it a philologist's task. The recognition that this work, too, lies within the province of jurisprudence is important, because it means that a qualified judicial officer's need to know the vernacular will no longer be dictated only by the desirability of following litigants and witnesses, but also by the desirability of investigating the adat law of his area. The present position is that in the very areas that are least explored, and therefore of exemplary value for the study of adat law, no qualified judges have yet been appointed. Here civil officers will therefore have to do the spade-work, and for this reason some understanding of adat law and its problems will be profitable to them.

The four government measures recommended so far — collecting adat decisions, publishing reports on adat law, extending tuition in adat law, and directing adat research — will in themselves do a great deal of good. But besides these, as a *fifth* measure, the appointment of one or more adat trustees may and should be demanded, itinerant officials for adat law, similar to those appointed for the study of native languages. It is an appointment which was urged as far back as 1886 by Nederburgh (IWR:1209) and more recently by Steinmetz (1903:1228). (—)

As a *sixth* and final measure, in order to string all this together, we might follow the example of French India, where a *Comité Consultatif de Jurisprudence Indienne* of nine indigenous members, seated at the capital, Pondichéry, has been appointed.[5] Their duty is to [*91*] advise government and courts on the adat law of the (Malabar) population, and to record this adat law. Their activities are revealed in *Les avis du Comité Consultatif de Jurisprudence Indienne avec une préface et des notes,* published in 1897 by the government printer at Pondichéry.

Our Government could do likewise, and establish an Adat Chamber or a Commission for Adat Law at Batavia, which could assist in supervising the proposed adat law examinations, and in collecting and publishing adat decisions and adat reports. Ultimately the Government might then be able to create the kind of advisory service which it has often needed, and which could provide the necessary guidance in a research programme which will require a good many years.

CHAPTER IV

LAW AREAS

[June, 1907]

[In this section Van Vollenhoven elaborates the concept of 'law areas' (*rechtskringen*), the function and place of which in the systematic, historical and comparative study of law, as he conceived it, he had indicated earlier (p. 34, above).

The existence of significantly different patterns of adat law within a distinctively Indonesian 'law region' (*rechtsbekken*) — which, he believed, extended well beyond the Dutch East-Indian archipelago — made it necessary for him not only to delineate geographic areas of substantial legal homogeneity, but also to indicate the kind of criteria on which he based these subdivisions. He considered that 'Linguistic and ethnological similarities (—) do not yet warrant the expectation of similar adat law; but they are nevertheless suggestive' (133). The important thing, however, was to have a clear idea of what, in the nature of adat law, constituted similarities or differences. Otherwise, he feared, the situation might be thought to be the same as in western Europe. 'In Warmond something may be punishable which has not been made an offence in Voorschoten; in Germany other heirs are recognized than in the Netherlands; Antwerp's municipal electoral law differs from that of Rotterdam; but nevertheless all the law of continental western Europe is largely patterned after the same model' (134).

This could not be said of the Indonesian archipelago, where different areas presented different problems of classification. Where it was evident that in one part of the Indies rules of adat law applied which were clearly different from those of a second or third area, these differences could, of course, profitably serve as a basis for sorting out the variety. Some territories — like those of the Minangkabau, the Toraja, the Balinese — would then readily present themselves as discrete law areas. In other cases, however, there were grounds for hesitation, especially where colonization of one area from another

(with a different adat law) had taken place. Should, for instance, the Minangkabau colonies in Aceh, or the Balinese settlements in (Sasak) Lombok, be regarded as discrete law areas? Or as extensions of their home areas? Or as foreign enclaves in another law area? Moreover, there remained certain islands and other peripheral areas of which too little was known for their adat law to be identified with that of an adjacent larger law area without danger of distorting the reality of the situation. Finally, as regards some law areas — West Java as against Central and East Java including Madura — there was little doubt that to analyse them separately would bring out their distinctive features; and yet it could not be denied that they had similarities sufficiently important and numerous to justify their inclusion within one law area.

For almost a decade Van Vollenhoven had systematically and painstakingly sifted the vast amount of historical, ethnological and other materials available — for a good part unpublished and scattered — in search of reliable adat law data.* The yield was uneven and often of doubtful quality. But it did enable him to suggest, 'for the time being', a division of the Indonesian archipelago into nineteen law areas (see below).

Although he had thus established a basic cultural and geographical framework for the comprehensive and comparative study of Indonesian adat law,[1] Van Vollenhoven did not proceed immediately to cast his successive area studies into this structure. Instead he devoted the larger part of the section on law areas to a description of the characteristic features of the four major types of indigenous community which he thought to distinguish in the Indonesian law-scape, past and present.

Van Vollenhoven was writing this part at a time when evolutionism still preoccupied many scholarly minds, and though he firmly rejected the idea that social institutions had developed unilineally he could nevertheless not resist the temptation to dip occasionally into a hypothetical past. Most of these passages have been excised from this edition. Another matter of editorial concern is Van Vollenhoven's use of *stam* in the sense of either 'clan' or 'tribe' (contrary to more recent Dutch usage, which has freely adopted the word clan as distinct from *stam* which is reserved for tribe, he usually seems to imply the former

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* [Chapter five of Van Vollenhoven's *Adatrecht* (Vol. I:92-129; not reproduced here) is devoted to a broad and systematic review of the written and unwritten sources of adat law, and to a critical evaluation of the materials he examined. - *Ed.*]

sense); and it is clear that his use of *familie* may reach beyond the extended family of modern usage to denote 'lineage'. Where his meaning appears to be clear, modern usage has been substituted for his.

More important, however, is his introduction of two juridical conceptions which, with their respective technical terminology — *rechtsgemeenschappen* and *beschikkingsrecht* — were to become methodological and conceptual cornerstones of his oeuvre, and of all adat law studies that followed his lead.

He had already emphasized the importance of *rechtsgemeenschappen* (lit. law communities) in his inaugural lecture at Leiden (1901), when he argued that the problems of identifying the true nature and the historical sources of law would be greatly eased if, in every instance, first priority were to be given to analysing the structure of the community concerned. He never defined the concept strictly, but its meaning is clear from the consistency of his usage. The term is here rendered as 'jural communities', and technically refers to those (larger and smaller) constituent corporate units of an organized indigenous society which, in Van Vollenhoven's conception, derive their distinct, legal autonomy in domestic affairs from the fact that each has *a*) its discrete representative authority, and *b*) its discrete communal property, especially land, over which it exercises control.*

The term *beschikkingsrecht* (lit. 'right of disposal'), which poses a semantic problem in Dutch as well as in English, is here rendered as 'right of avail'.[2] In Van Vollenhoven's conception it is the fundamental right of a jural community freely to avail itself of and administer all land, water and other resources within its territorial province (*beschikkingsgebied,* 'area of avail') for the benefit of its members, and to the exclusion of outsiders, except those to whom it has extended certain limited, and essentially temporary, privileges. The right of avail is thus conceived also as the basic communal source of a whole range of discrete and more or less individualized user rights, which are vested

* [In his authoritative treatise on Indonesian adat law, Ter Haar defines *rechtsgemeenschappen* as 'organized groups of permanent character having their own authority and their own material and immaterial property' (1939: 14). The term has no exact equivalent in English. 'Autonomous community' is the term used (though not quite consistently) by Hoebel and Schiller in their English edition (1948) of Ter Haar's book. Though discrete internal autonomy (sovereignty pertaining only to the largest embracing polity) is undoubtedly a crucial aspect, 'jural community' has been selected in the present translation in order to convey the distinctive *legal* character of this autonomy by which Van Vollenhoven sought to distinguish these communities from other, more or less cohesive, social groupings. - *Ed.*]

in persons or groups by virtue of their membership of the community. — *Ed.*]

(— —)

[*134*] Although an accurate delimitation of the different law areas can obviously only be made after adat law everywhere in the Indies has been thoroughly investigated and evaluated, for the time being a [*135*] division into nineteen such areas may be recommended:

1. Aceh (excluding the Gayo- and Alaslands)
2. The Gayo-, Alas-, and Bataklands
3. The Minangkabau territory
4. South Sumatra
5. The Malay territory, that is, the east coast of Sumatra (excluding the Batak area) together with the Riau-Lingga archipelago, of which the Malayan peninsula could be regarded as the British moiety
6. Bangka and Belitung
7. Borneo excluding Serawak and North Borneo
8. The Minahasa
9. The territory of Gorontalo
10. South Celebes, together with the Buginese west coast of the island.
11. The Toraja territory
12. The Ternate archipelago
13. Ambon and Moluccas (Seram, Buru, etc.)
14. Dutch New Guinea
15. Dutch Timor with its archipelago
16. Bali and Lombok
17. Central and East Java, with Madura
18. The central Javanese Principalities
19. West Java (Pasundan)

As said before, it would be wrong to assume that the difference between these Indonesian law areas is confined to differences of rule and precept within identical frames or patterns of law. On the contrary, it is the very frame or pattern itself which, time and again, shows a different shape — though the difference is less than between Dutch and English law, or Roman and Germanic law. This difference is largely due to the diverse structures of the jural communities found in the various parts of Indonesia, structures with which all other adat law is inextricably bound up, an aspect that usually receives too little attention. It is true that cultural anthropology has revealed the

particular kinship structures of the various areas (divisions into tribes or clans, families, households) and the set of rules by which they are governed (collective or individual kinship relationship; matrilineal, patrilineal, cognatic principles). But it is juridical science that must ascertain the significance of these kinship groupings in terms of legal authority. It must point out that the legal significance of the family in Minahasa or Minangkabau territory is entirely different from that of the family in Java; and that nowhere in Indonesian adat law does the individual household appear to have the status of an autonomous jural community. And jurisprudence must also find out what types of territorially determined autonomous communities exist to-day. Rules of kinship are undoubtedly of great importance everywhere, but while in some instances they come to the fore with the very first outline sketch of the legal order, in other cases they are only of secondary importance (—).

[*136*] The genuine jural communities can be divided into four distinctive groups, but there is an urgent need for an accurate report on their present state in Indonesia. (—)

1. *Genealogical groupings*

In some areas the only jural communities are genealogical groups, based on and continued by descent from common ancestors. As far as Indonesia is concerned the most elementary of these are of a hypothetical character (—).

[*137*] (*a*) Of the existing types of Indonesian blood-communities the first to be mentioned is the nomadic or sedentary clan or, in its stead, the lineage, within which not families but individuals carry rights and duties. Broadly speaking, legal authority — but only in the sense of upholding the adat, since chiefs are here no more than the first among equals — is vested in the clan or lineage authorities, no legal authority being vested in the family or household as such. Legal sanctions are not confined to expulsion, but include other punishments as well. The clan or lineage is to a large extent responsible for its members' conduct. Communal property still exists, but individual property is becoming pre-eminent. Barter between individuals is already important, but has a diminishing significance between clans or lineages. Marriage is a purely individual matter. Only after their close relatives are dead do children become a charge upon the clan or lineage. Adoption by the clan is possible; but not by the family as it is not an autonomous

community. The rules of inheritance are most elementary. The administration of justice with regard to individuals is in the hands of the clan or lineage authorities. Taxation exists only in a most rudimentary form.

The villages, in which such clan or lineage members are often found living together, therefore do not constitute autonomous groups but are merely localities of common residence, because only the clan (lineage) has a corporate legal existence. This contrast is insignificant when an entire clan (lineage) is living together as an exclusive unit under one roof, as for instance among the Dayak; but it is evident where each clan is distributed over a number of villages within its own territory; or where clans are living together in such a manner that a given village shelters people of different clans.

This structural form — i.e. the absence of any jural community other than clan or lineage — is found among the Gayo. There the village (*kampōng*) is merely a place where families live together, whether they belong to one or more than one clan. Neither the family (sometimes called *suku, kuru*) nor the household has its own authority or property, except in a purely domestic sense. (The territorial chiefs and divisions in Gayoland are institutional oddments derived from elsewhere.)

The same applies to the Dayak of the interior of Borneo. As a rule each entire clan lives in one long house (clan house, *umā*), in which the families have their separate rooms. If there are homesteads which merit the name of 'village', they are formed either by a clan house with annexes or by a clan house with the dwellings of more or less dependent squatters from other clans. As a rule, clans keep to themselves, even if they live in close proximity to each other. The headmen of the clan houses appear to be the only local authorities.

Timor also seems to belong to this variant. Here the population unit is the clan (*fukun*, under a clan head or *tumukun*) which, mingled with other clans, occupies a certain territory. The clan here is dispersed over a number of villages and hamlets, but these villages [*139*] (supervised by headmen, *matas*) are not, apparently, jural communities. Various clans occupying the same territory are often grouped together under one head, who is a representative of the princely government; but these groupings have no local authority or common property of their own.

(*b*) As a second variant may be mentioned the case in which the clan itself, though well known and recognized as an institution, does not

function as a jural community. That function is fulfilled exclusively by co-residing smaller groups of fellow clansmen, the clansmen's villages. Thus — according to information from A. C. Kruyt — each of the clans (e.g. To Pebato, To Lage) in the Toraja area lives in its own territory (*lemba*), but legal authority rests with the groups of clansmen living together in villages (*lipu*) under genealogical headmen (*kabosenya*). These communities have the right of avail (and common property), and the spirit house (*lobo*) here also serves as village council house. The clan territory comprises a number of such villages, but there is no jural community superior to them, except in those areas where chiefdoms and chiefs have emerged, such as those of Tojo, Sausu, Parigi (—) and Luwu. Nor do families and households constitute jural communities, although each is conscious of its own identity (a single dwelling usually contains more than one household, and sometimes from ten to fourteen).

A similar situation is found in those parts of the Ternate achipelago where the process of establishing village communities on a territorial basis has not yet begun. Here, too — according to Hueting — the only jural communities are the clansmen's villages (*soa, hoana, soana,* etc.) with their temples (*salu, halu,* etc.; *sèri*), each comprising fellow clansmen under the control of genealogical headmen (elders: *mahimo,* etc.). Smaller units, however, like the family and household, have no legal authority. Nor do the clans themselves (e.g. the Tobaru, Lòda, Galèla, Tobèla) possess such authority, although it is common for closely neighbouring clansmen's villages — here, too, clans have their own territories — to be represented by one headman (*sangaji*), appointed both to promote their local interest with the sultanate and to carry out the sultan's instructions.

(*c*) Finally there is a third variant of genealogical community, in which not only the clans (lineages) function as jural communities, but [*140*] also their component families, within which, in turn, individual members carry legal rights and duties. Even if no examples of this variant were still to be found in the East Indies it would still deserve mentioning, because the social order in both Minangkabau and Minahasa (see section II, below) must have known it in the past. But current examples do exist: on the islands of Buru and Seram the family (*etnate, soa*) functions as a jural community above its individual members; above the family is the clan (in Buru, *fenna*; in Seram, *amani*) with its own territory; and above the clan, the confederation of clans (in Buru, *fugmolin*).

(*d*) Clansmen's villages with families functioning as jural communities are apparently unknown.

2. *Territorial and genealogical groupings*

The second category exhibits as its main feature a *territorial* jural community which embraces genealogical jural communities and their individual members.

First comes the territorial unit in question, which may be a district or a village, conceived not merely as a geographically defined area but as an autonomous legal body with governing powers and common property. Government rests with a territorial authority; the district (village) owns property or has the right of avail over the community's domain; and it can conduct legal transactions. Under the district or village, the family is a distinctive jural grouping with similar features: family authority, family property, family transactions, etc. A clear example of this was formerly provided by the Minahasa (the pattern is changing nowadays): at the top, the district *(pakasaän,* the territorial tribe); next — and after the more recently emerging village community — the family, ruled by its elders, with its family property, its laws of adoption, guardianship and inheritance; and finally the individual. Neither family branches nor single households are here corporate units.

In part of the Ambonese law area (Ambon itself, but compare the Kei Islands) the picture is that of families (*dati*; now rather meaning 'co-owners of land') within territorial villages, above which one may sometimes find a confederation of villages. Similarly, according to Hueting, in those parts of the Ternate archipelago where the clansmen's villages have fallen apart (though kinship ties are not forgotten), property has become consolidated as family property, and a local village authority has come into existence. In other words, the territorial [*141*] village has developed here as a jural community, with families (*asal*) as smaller jural communities under the control of their elders. The family property or estate is here called *pusaka.*

The same picture is to be seen in Minangkabau. Here the list of jural communities reads from below upwards: the family (*buah paruik*) living together in one house *(rumah)*; the section of the clan (*suku*) living in the one village; the territorial village itself (*nagari*), consisting of two or more *suku*-sections; often, a federation of villages; and sometimes, finally, a confederation of village federations.

Some reports on Bali speak of family property and family lands, but this is merely an abbreviated way of saying that members of a particular branch of a family are entitled to the profitable use of certain lands belonging to a *désa* or village association (Liefrinck, 1890:410f.). The family in Bali is no more a jural community than the household (*kuren*) is.

The converse of the above-described situation, that is, territorial jural communities subordinate to genealogical communities, does not occur. It is, in fact, difficult to see how the greater unit could be held together by ties of kinship if the lesser units were created purely on the basis of common residence.

3. *Territorial groupings without genealogical communities*

To the third category belong the territorial jural communities which do not have subordinate genealogical communities, but whose constituent components are either subordinate territorial units with their respective individual members or individuals with legal capacity.

(*a*) In many regions of Java and elsewhere there are villages (known by various indigenous terms), functioning as jural communities over individuals with legal capacity. The function of the village, however, still closely resembles that of the genealogical communities. Recruitment and expulsion of members may still be significant matters for a village authority; the village possesses landed property of considerable importance, the use of which is not confined to the provision of administrative facilities, such as council halls, etc.; the village assumes responsibility for orphans, has a right of inheritance, and is entitled to abandoned property. The families in such villages, although recognized as distinctive units, are merely kinship groupings and not jural communities.

[*142*] The Javanese *désa* with a communal or mixed tenure of land usually belongs to this category. The same type also exists in the Bataklands. Unlike the *suku*-section in Minangkabau, that part of a Batak clan (*marga*) which happens to live in a particular village is no longer a jural entity with a distinctive authority and, perhaps, property of its own — however important it may remain for an understanding of the village structure. In the Bataklands the jural communities are: first, the territorial village (*huta, kuta*); and often, above the village, the federation of villages (*partahian, urung*). A similar situation exists in a

large part of southern Sumatra, where the territorial village (*dusun, tiuh*) is, or was, subordinate to the territorial village complex (*marga, mendapo, mego*). Also the islands of Bangka and Belitung, as well as the neighbouring Malay territory of eastern Sumatra, should apparently be classified under this category.

This type of territorial jural community presents a peculiar variant in south Celebes. The most important social grouping in this area is the *gaukang* society. It is a group of people which was brought together — according to native belief — by a *gaukang,* a fetish or relic of miraculous power. Occupying a complex of villages and stretches of land, it recognizes the authority of the custodian of the fetish as its *karaeng* or *arung.* If such miniature states — some of which are completely disintegrated — happen to be loosely federated, the most important among the custodians is often regarded as a 'regent' by our administration (as distinct from the others, who are called *galarang, matowa,* etc.), and supported by a *sulewattang* (a high-ranking executive) in the administration of his own little domain or of that of the village confederation. Occasionally, however, such *gaukang* societies, or confederations of little *gaukang* states, are tied together into a firmly established political superstructure, a union, of which the states of Gowa and Boni are illustrations. Intermediate forms between loose federations and unions are also found.

It seems that in these little *gaukang* states neither the villages nor the families constitute jural groupings with discrete authority and common property. The population is largely dispersed; the subordinate headmen are followers and counsellors of the 'regent' or of the *galarang,* and are usually the heads of groups of villages originating from the first *gaukang* settlements. The *gaukang* societies and the unions of *gaukang* states are the only jural communities.

[*143*] (*b*) There are, however, areas where such territorial communities function only in an administrative capacity, with little responsibility in financial matters, and without right of inheritance or right of guardianship, and without landed property of their own. A more or less pure example of this is found in Aceh, where the jural communities are the village (*gampōng*), the chiefdom, and sometimes the federation of chiefdoms (*sagi,* etc.). Other examples occur in Madura, and in Java in areas with individual land tenure where the village (*désa*; in the Priangan highlands, *kalurahan*) is the only jural community.

The difference between types (*a*) and (*b*) in this category of territorial communities is often blurred.

4. *Voluntary corporate associations*

Fourthly and finally must be mentioned — or at least noted for future reference — the situation in which indigenous jural communities based on contract between interested individuals coexist with any of the three categories discussed above. Societies or associations of this kind have as yet only rarely reached a state of maturity in indigenous law, but they may ultimately become of great importance within the Indonesian legal order. They seem so far to have been found mainly in different parts of Java (including perhaps Madura) and in Bali and Lombok, though in Java they serve only a few customary needs instead of a wide range of conceivable purposes. (—)

The Javanese adat associations are especially, if not exclusively, concerned with mutual aid, particularly in connexion with the preparation of ritual feasts. They are called *sinoman* or *arisan,* and have their own executives and property. The *désa* association (*sekaha-désa*) in Bali and Lombok — the group of persons, with a discrete governing body and common property, which constitutes the core-group of the geographical *désa* — should probably be regarded rather as a natural Balinese form of village settlement than as a voluntarily created society. But the *subak* (irrigation) association may definitely be regarded as a private society equipped with its own authority and property. Although a product of private initiative, it nevertheless requires the sanction of the local authorities, and is functionally as much a 'public utility [*144*] corporation' as the water-corporations in Holland. There are, however, in Bali countless other societies for utilitarian or recreational purposes, or both (Liefrinck, 1886:1038). Many if not all of these have the character of minor jural communities, each with its own authority and property. If for this reason it is suggested that, in this respect (as in so many others), the Balinese law area appears to be legally the most developed, this is no undue derogation of the fact that in the Minahasa, as in other Christian areas in Java and elsewhere, there are Christian parish communities, for the vast majority of the latter have been established under European influence. It is, moreover, highly doubtful if such parishes can be qualified as corporate associations (—).

In the preceding survey only casual reference has been made to monarchical forms of government, which established themselves over the indigenous jural communities in Java, Sumatra, Borneo, Celebes and elsewhere, but subsequently either faded away, or were replaced or kept alive by our administration. Such monarchical rule (p. 32, above)

has undoubtedly excercised a significant influence upon Indonesian adat law. On the whole, however, it did not affect the social structure of the indigenous jural communities, except in one, admittedly important, respect. Where a government displays the character of an arbitral authority, the autonomy of the lower communities remains largely untouched, for although it is equipped with powers transcending the authority of the lower jural communities, it nevertheless generally lacks coercive power (or perhaps shows some other weaknesses). This is the position in Bali, and in some of the *raja*-states in Minangkabau and Timor. If, however, such governments exert a more powerful influence, the lower communities are often weighed down to the extent of losing all or most of their autonomy, as has happened under the pressure of certain Batak *raja*-states, the sultanate of the east coast of Sumatra, the little states in south Celebes, and, especially, the principalities in Java. Perhaps even Bangka and Belitung should be mentioned in this connexion (—).

[*145*] If we now apply this classification of jural communities to the nineteen law areas which we distinguished, the results are as follows:
— the genealogical structure is dominant in Dutch Borneo, the Toraja territory of Celebes, Dutch New Guinea and West Timor;
— a partly genealogical, partly territorial structure prevails in the Minangkabau and Minahasa;
— the territorial structure is dominant in Aceh, the Malayan territories, Bangka and Belitung, south Celebes, and the three law areas comprising Java and Madura;
— a territorial structure with tendencies towards voluntary corporate associations is found in Bali and Lombok;
— and each of the following law areas reveal a variety of these structures: Gayo-, Alas- and Bataklands, south Sumatra, Gorontalo etc., the Ambon area and the Ternate archipelago.

This classification is obviously not inconsistent with the fact that in areas with a genealogical structure the needs of a territorial organisation may already exist (e.g. the independent Dayak villages near the coastal strip of Borneo); or that there may be genealogical traces left in areas with a territorial organisation. Nor can it be denied that, because the transition from genealogical to territorial jural communities is almost invariably a gradual process, it is sometimes impossible to draw a sharp dividing line between the two.

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[*146*] Before we conclude this outline, however, a warning should be voiced against the belief that the adat law of the Indonesians differs completely, not only from one of the nineteen law areas to another, but even from one locality or village to another. If there were such endless variety, it would indeed be a hopeless undertaking to investigate and describe it, or possibly to accommodate it in legislation. Because of a beneficent village autonomy various differences do occur from one place to another, but only in minor aspects. Should one wish to know the conditions of a contract of hire in Madura, one would find a good many variations, but these concern such details as locally accepted time limits. Should one wish to know the law of inheritance in Java, it would be perfectly feasible to abstract from its great variety a common denominator, because 'the law of inheritance is only seemingly wrapped in as many covers as there are villages' (De Gelder, 1897, II:307-13). Those seeking an understanding of the law of kinship in south Sumatra will, according to Wilken (1891:153), indeed find a multitude of different forms and modulations, but yet be able to 'separate the essential from the incidental'. And should one wish to know about marriage in the Padang highlands, Van Eerde (1901:388f.) has pointed out that 'nowhere, (not) even in closely adjoining regions, is exactly the same adat observed', its practice varying like bamboo measures cut from different shoots; yet all these measures are cut from the same bamboo, and this 'essential thing', regardless of its 'minor deviations or variations', can perfectly well be observed and described.

Who, in fact, would refuse to write an essay on the Acehnese or Batak languages because these are collections of dialects? While the variety of adat law should therefore readily be acknowledged, the problem should be viewed in its true and none too formidable dimensions.

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CHAPTER V

ACEH

[June, 1909]

Sources

[*148*] Snouck Hurgronje's *De Atjèhers* [1] has been quoted so often in these pages that no more need be said about its importance as a source of information on Acehnese adat law. The book is 'a very broad revision of the first part of a report on the politico-religious situation in Aceh' (submitted to the Government in May, 1892), for which the author collected the material during a visit to Aceh Major from July, 1891 to February, 1892. It would be wrong to presume that this work covers the whole of Aceh and its dependencies.[2] The original edition deals with the inhabitants of the lowlands and highlands of Aceh Major, as observed from the lowlands (the estuary of the Aceh river). Hostile relations at the time did not permit deeper penetration without peril of life, and a bold plan to visit and explore the interior (the highlands of Aceh Major and the expansive dependencies) in disguise, or via Pinang, was fortunately not carried out (—). The military action by Van Heutz, however, has since 1896 given a firm foothold for our troops and authority in the remaining parts of Aceh.

In spite of this, the illustrated English edition of 1906 has not been revised to include all of Aceh, but has retained its original scope. Information on adat law in the dependencies must therefore be sought in other works; but since the great majority of the population of those areas originates from Aceh Major itself, substantially the same adat law as described in *The Achehnese* will be found there.

A perusal of the list of possible sources readily reveals that there [*149*] are no published decisions on Acehnese adat law.

Both in the area directly under Dutch administration (Aceh Major) and in areas under indirect rule (the little principalities or chiefdoms on the west, north and east coast) the people have been left in enjoyment of their indigenous judicial tribunals (—). The judgments of

these tribunals, however, at least in the past, paid little attention to adat law. On the contrary, they showed traces of the personal opinion, arbitrariness and lack of continuity of their European supervisors; only a judgment from Idi Rayök seems to have been recorded (RNI 63, 1894:705f.). Government reports on agrarian matters are also lacking. A short account of Aceh at the time of the Sultanate can be found in TBG 32 (1889):89-97. Reports on conditions in the dependencies have often been published in BKI.[3] The explanatory memorandum (Bb. 3775) by Der Kinderen on the regulations for government native courts in Aceh and the ordinance on the *musapat* court [at the capital, Kutaraja], can only sow confusion in connexion with adat law. Occasionally a little information can be gleaned from the reports on the political situation in Aceh which regularly appear in the *Javasche Courant* [the official gazette]. Besides *The Achehnese*, only two other scholarly publications, both by Van Langen (1888*a*; 1888*b*), need be mentioned. (—) The explanatory memoranda on political treaties and declarations signed by the local chiefs in the dependencies give practically nothing in the line of adat law; the international Treaty of 1857 with the Sultan of Aceh has been submitted, without commentary, to Parliament as a political contract.

Indigenous codes of law are apparently non-existent; apart from Islamic studies, there is nothing on adat or adat law.

Formal regulations of Acehnese village authorities or chiefs in Aceh Major are unknown.

There are no written or printed edicts by the chiefs in the dependencies. Edicts of the former Sultanate of Aceh do exist: the well-known *Adat Mökuta Alam* (dating from between 1607 and 1636) has been published in Malay, with a translation, by Van Langen (1888*a*) [*150*] together with an edict of 1723. Others are mentioned by Snouck Hurgronje (1893:5).

Of the world religions, Islam is found here and professed by all Acehnese. Consequently, there are some Moslem elements in the adat law (*hukōm*, as against *adat* — see p. 4, above).

Delimitation of the law area [4]

The Aceh law area runs from Singkel (which is partly Batak) on the west coast, via Aceh Major in the north, to the area of Tamiang (which is partly Malayan) on the east coast. South of the western part lies Batak territory; south of the eastern part lies Malay territory; the high mountain area of the Gayo, Alas and Batak, enclosed by a wide

forest belt on the slopes, is wedged between western Aceh and Aceh Major on the one side, and northern and eastern Aceh on the other. The islands Pulò Wè and Pulò Bröëh, which have few indigenous inhabitants, and Pulò U (Simölu, Simalur) belong to the Acehnese law area, as does Trumòn. (—) Singkel, on the other hand, which was returned to Aceh in 1905, rather belongs to the law area of the Gayo-, Alas- and Bataklands. The Aceh law area, as here indicated, has an estimated population of 550,000.

In the southern half of the steep west coast of Aceh there are Minangkabau colonies which have retained important characteristics of their own adat law. Such seaports as Lhōk Sömawè also have a mixed population. In the highlands of Aceh Major foreign elements seem to be scarce; but in the lowlands, especially in and near the capital Kutaraja, and on Pulò Wè, there are many Niassers, Bataks, Padangers and other Malays, and lately also Javanese and Sundanese. Trumòn has many Bataks, Tamiang many Malays.

The population figure indicates that this law area is not densely settled. Cultivated fields are mainly found in the lowlands of Aceh Major, in the valley of the Aceh river, and in many coastal districts in the north and north-east, particularly in Pidië; but the hilly [*151*] and mountainous areas are largely untouched, especially the primeval forests in which, however, pepper plantations may be found.

Is it necessary to distinguish smaller divisions — law districts — in this law area? Apparently not. What is known of the dependencies — most of which were settled directly or indirectly from Aceh Major or Pidië as late as the nineteenth century — gives the impression that their adat law resembles that of Aceh Major in all principal aspects.

The long period of disruption and much arbitrary intervention from our side have of course changed and spoilt much of the adat law of forty years ago.

Jural Communities

The political organization in this law area is of a territorial character. The lowest jural community is the village, *gampōng* or *mönasah* (as often on the east coast, but also elsewhere), membership of which is determined by common residence and not by kinship. The Acehnese village has its own governing authority and its own modest common property.

Above the village is the *ulèëbalang*-ship,* sometimes divided into *mukim* [or native districts]. The former indigenous term really belongs to Aceh Major, but has lately been introduced by our Administration to the self-governing chiefdoms in the dependencies. The *mukim* is, as a rule, merely an administrative unit (—) and not a jural community with its own government and property. Unlike the villages and chiefdoms these native districts are not indigenous, but derive from the sultanic government which, under the influence of the *ulama* (Moslem scripturists), preferred a centralized organization. It is therefore not surprising to find them in Aceh Major around the sultan's capital and in neighbouring chiefdoms such as Pidië and Samalanga, but seldom in the more remote dependencies (—). In the latter areas the word *mukim* is normally used only in its older meaning of 'area of a Friday mosque (Friday Community)', derived from *moqīm* (resident of a Friday area) in Moslem law. On the other hand there are in Aceh [*152*] Major some twenty 'independent *mukim*' — occasionally former *waköëh* or 'exempted' districts which, alone or with one or two others, have developed into jural [*ulèëbalang*] communities without actually being so called.

The *ulèëbalang*-ships and self-governing chiefdoms could be regarded as little indigenous Acehnese states. There are fifteen of them in Aceh Major, and well over a hundred in the dependencies. They have their own local government (the chieftain with his officials) and their own property and income. In Aceh Major our Administration has looked upon these chieftains as functionaries of the sultan rather than as genuine local rulers. When the sultanate was taken over, they were consequently not treated as chieftains, rulers of miniature states and leaders of indigenous communities, but ranked as government officials ('district headmen', see ISb. 83/1881, s.4; Bb. 6881:265). In the dependencies, however, our Administration was better informed, and recognized the autonomous chieftains as the heads of self-governing territories by means of political agreements (at first the agreements of eighteen articles, which were mere scraps of paper; later the brief

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* [Van Vollenhoven made copious use of indigenous terms, with which Dutch scholars and government officials were expected to be familiar. For the benefit of other readers, however, the following substitutes are used in this translation:

ulèëbalang	— chief(tain)
ulèëbalang-ship	— chiefdom
mukim	— native district
landschap (Du.)	— (self-governing) chiefdom - *Ed.*]

'Aceh Declaration' of three articles). In the subsequent legislation they are therefore not referred to as district headmen but as chieftains (*landschapshoofden*, see ISb. 473/1904, s.3). Colloquially, the chieftains of Aceh Major are also known as *raja*, a generic term which applies to the variously titled chiefs of the dependencies as well. From what has been said about native districts, it follows that such designations as 'the IV, VI, or VII *mukim*' do not imply federations of communities actually composed of four or six or seven *mukim*, but merely refer to an historical grouping of administrative units the number of which often changed in the course of time.

Even before our arrival the country of Aceh was fragmented in countless such miniature states. It is true that in many areas there were, and still are, loose *federations* of chiefdoms, which probably grew naturally from the indigenous structure and were not created by sultans. But the reputed ruler of each of these was merely the first among his fellows — and not always the most powerful. There was, and is, no trace here of an internal, centralized authority. Examples [*153*] of such loose federations are the following: the three *sagòë* (*sagi*-chiefdom) of the XXV, XXVI and XXII *mukim* in Aceh Major, the XXII *mukim* Béntara Kömangan or Gigiëng federation in Pidië (north coast), the Pasè federation (east coast), the federation of Kaway XII between Aceh Major and Gayoland (north coast), and of Blang Pidië (west coast).

The Sultanate of Aceh, which stood above these chiefdoms until the Aceh War, had a foreign character. Initially it must have been Malayan and Arabic, later Buginese. It wielded some real power in the lowlands of Aceh Major; but in the highlands, in the dependencies, in Gayoland and farther south it enjoyed homage and respect rather than power. Under the more recent sultans (before and during the outbreak of the Aceh War in 1873) it had no real power beyond the spacious palatial precincts, the *dalam* (called *kraton* by us). When the sultan fled in 1873 to Kömala in Pidië even this remnant of power vanished (—).

In three respects this sketch gives an incomplete picture of the political structure in this law area. First, beside the great majority of villages which come under chiefdoms, there are a number of villages, in Aceh Major and elsewhere, which are considered to be 'independent' (see ISb. 259/1899, ISb. 105/1906). Secondly, the Government is also inclined (ISb. 509/1908) to regard as jural communities the pepper plantations or *sönöbōk* laid out in the primeval forests of the XXII

mukim and in the dependencies, where a number of men (without wives) have flocked together in colonies (—) under the control of a plantation headman. According to adat, however, such colonies are dependent settlements of their villages of origin. Where they had their own export estuary (*kuala*) with a small port and market place (*ködè*), and conditions in the interior were favourable to long-term agriculture, such colonies sometimes developed into autonomous chiefdoms with villages. It was not unusual for chiefdoms in the interior to lose their independence and become subordinate (though hostile) to the port [*154*] *raja,* and be governed by his relatives. Thirdly, among the Minangkabau colonies mentioned above (p. 56) there are no villages or *ulèëbalang* chiefdoms, but there is instead a faint imitation of the social structure of the Padang highlands: the matrilineal *family,* above this the *suku* and then the little native *state* itself. Tapak Tuan, Labōh Aji and Susōh, all on the west coast, are examples of such states. This situation, however, differs significantly from that among the pure Minangkabau. The *suku* here, each under a single *suku*-head (*datōk*; abbreviated *tōk*), are not cohesive genealogical communities, linked groups of related families, but groups of colonist families originating from the same region (Rau, Pariaman, Kampar, etc.). The genealogical factor has therefore faded into the background. The native state here is not, like the *nagari* in many parts of the Padang highlands, a collectivity of related families governed by their representative, but is composed of quasi-*suku,* and governed jointly by the *suku*-heads the most influential of whom is called the chief *datōk.*

Besides these colonies, (—) there are intermediate forms of organization in which the genealogical Minangkabau structure inclines towards the territorial Acehnese structure, as in the little chiefdoms of Mökèk and Sama Dua on the west coast. Government policy, too, stimulates this levelling tendency.

In this law area there is no question yet of home-grown co-operatives (corporate societies, etc.): co-operation for a common purpose is not characteristic of the Acehnese. The only institutions resembling a co-operative society are, here and there, guilds of fishing boat masters (*pawang*), who elect their headman (*panglima pawang*) with the approval of the chief. But the occasional groups of villagers co-operating in the slaughter of water buffaloes for the two major festivals prescribed by Moslem law can no more be considered as corporate societies than the body of persons who collectively organize religious

meals in the village, for in neither case is there a discrete governing authority and common property.

[*155*] It is obvious that the 'legal personality' of the jural communities described above must not be conceived generally as a recognized and strictly defined quality. Also among the early and later Germanic peoples the common land of the *mark*-community was mixed up with the landed property of its members. Even in the hey-day of the Roman jurists Roman law, when referring to the *municipia*, stated that anything belonging to the *municipium* belongs 'to the *municipes*'. Likewise the Indonesian will, for a long time to come, describe what belongs to a village or chiefdom as something belonging to the villagers or to the *ulèëbalang* concerned — unless our Administration defines the position, as it has done with the chiefdom treasuries, and the village ordinance of 1906 in Java.

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As a result of a misjudgement of the actual situation, our Administration turned the *ulèëbalang* in Aceh Major into a kind of Javanese *wedana* [district headman] — which is not in accordance with adat law, nor, therefore, with sections 67 and 71 of the *Regeringsreglement* of 1854,[5] nor with what has been done in the dependencies. A rectification of this error might be a step towards a sound decentralization policy.

Individuals

The mental attitude, so often found in primitive genealogical communities, by which an individual feels himself to be more or less an indivisible part of his jural community, does not exist in Aceh. Yet the people do not (—) easily detach themselves from their villages or chiefdoms. According to adat law a person can only move away [*156*] from his village for reasons considered valid by local usage. For women there are hardly any, except, for instance, marriage with the headman of another village; for men it may be the supervision of gardens situated elsewhere, or constant quarrelling with fellow villagers. Even then, permission from the headman of both the old and the new village is required. Only if a person leaves his chiefdom, must the chief be notified. On the other hand, permission from the chief of the new area is required, especially where a number of people together want to develop new land of some value, in which case he often provides the newcomers (pepper planters, etc.) with the most essential requirements, such as agricultural implements, seed, and rice for one year. (If there is no chief the sultan would have to give

permission.) The chief and village headman naturally lose control over people who have permanently moved to another territory. In the colonies of pepper planters, who are forbidden by adat law to take their wives with them, women are allowed only when the settlement has become permanent; many *ladang* [dry rice fields] are merely a hide-out for hostile refugees.

Every person (formerly even slaves) in Aceh had and has legal capacity, carries rights and duties. The capacity to transact, however, is limited for children under age and mentally deficient people, the limitations being determined by common sense. Considering the important position of married women in Aceh, there is no question of limiting their legal competence. A formal guardianship (—) is unknown in Acehnese adat law.

Not only a person's actual legal capacity, but also the legal rules applicable to him (marriage prohibitions, bridewealth, etc.) are to some extent influenced by his social class, though among an unrestrained people like the Acehnese the differences between social strata are not nearly as great as, for instance, in Java. There are, first of all, the *tuanku* or royalty, the comparatively few relatives of the sultan; then the nobles (*uröëng ulèë*), that is, the *sagi* heads and other members of chiefly families, *mukim* headmen, etc.; further, the middle class (*uröëng pötöngòhan*) such as village headmen; and, finally, the commoners (*uröëng iku*), of whom those with slave blood are considered [*157*] the lowest of all. Of a purely incidental nature are the privileges enjoyed by some people on account of their distinguished origin, or their importance as authorities on Moslem law [*ulama*], or, formerly, their status at the sultan's court. Together with their immediate kinsmen, and sometimes even their descendants, these people are or were treated with great deference by the *ulèëbalang* in whose chiefdom they live, therefore enjoying a kind of immunity called *biböëh* or *waköëh*. Occasionally, however, as in some villages in Gödōng, this also affects their general legal status. Classed as Arabs (i.e. as 'foreign orientals' and not as Acehnese) are the Moslem nobility who, as descendants of the Prophet, are highly honoured in Aceh especially if they were actually born in Arabia. In our archipelago they are usually referred to as *sayyid,* in Aceh *sayét* or *habib*.

With the abolition of slavery our Administration has made an end to the class of male and female slaves (mostly people from Nias) who used to be far more numerous in the lowlands than in the highlands and dependencies.

Persons who, as legal scholars and pious men *(ulama, löbè)* or as religious officials or functionaries (*kali,* mosque *imöm, hatib, bilöë, töngku mönasah*), are closely associated with Islam, are given the title of *töngku* (outside Aceh Major also bestowed upon others), but there is no reason to assume that this religious class has a distinctive legal status.

Executive, Judicial, and Legislative Powers

In the Acehnese villages (*gampōng*) these three powers, insofar as they exist, are not separated. Fused together they are vested in the same authorities. In the chiefdoms there is a slight tendency to separate the executive and legislative power from the administration of justice.

The village authority consists of the village headman (*köcik*), the village elders (*uröëng tuha*), and the village religious officiant or representative of Islam (*töngku; töngku mönasah*). Including the ordinary villagers (the 'children of the *köcik*'), the village therefore comprises four elements.

As a rule all dwellings (here erected on stilts) are built on separate residential plots, which have some trees and other useful vegetation. Fenced off with lattice work and shrubs these plots give access to the village path or paths, which lead in turn (without a gate or other partition) to the main road. Somewhere among these plots, next to path or road and sometimes in a small enclosed yard, there may be a little [*158*] mosque, or else the village prayer house (*mönasah*). Sometimes it is situated at some distance from the village. If a *mukim* headman or a chief lives in the village, it also contains his *kuta,* a more sturdily enclosed plot where he and his retainers occupy a number of houses. Unlike some other territorially organized communities (e.g. in Karo-land and Jambi), where villages may contain wards of fellow kinsmen, the Acehnese village has no such residential clustering of genealogical units (here: members of one *kawōm,* lineage). The homesteads of members of different *kawōm* are here intermingled within the village enclosure.

Forming part of the village are in the first place the residential plots and paths; further, the complex of fields and gardens (*blang*); and finally, unless all available land has already been brought under cultivation, a remaining stretch of level land (*padang*) surrounding the village (likewise in the dependencies?). The woods, primeval forests and other virgin land, however, do not come under the villages. Village signposts or boundary signs are lacking.

The settlements of some importance near dry cultivation fields (*ladang*), the pepper plantations in the forests, the complexes of jointly enclosed wooden trading stands (*ködè*) with adjoining living quarters, and finally the toll-houses (*kaway*) found between Aceh and Gayoland, may all be regarded as hamlets belonging to villages. These hamlets may even grow into new villages.

Even where some villages closely adjoin, as in one or two capital settlements like Kutaraja, or where about four villages are grouped like wards around a Friday mosque to form a kind of little town (e.g. in Buëng), each *gampōng* keeps its undisputed autonomy.

The *köcik* [village headman] and *töngku* [Islamic officiant] are said to hold office at the chief's pleasure, but as with most other Acehnese offices, their functions are as a rule hereditary — which has its advantages. The village elders, an indeterminate number, are neither appointed nor regularly elected, but tacitly recognized by public opinion for their ripe experience and civility, one of them being more prominent as deputy headman (*waki*).

The disposal of cases by *köcik* and *töngku* in consultation (*mupakat*) with all adult men of the village (not always in or near the village hall) occurs less often than the regular consultations with the village [*159*] elders; but the headman tries to heed the wishes of all, if only because his decisions would otherwise be ignored. The adat determines what interests are to be regarded as village interests, and therefore which matters should or must be dealt with by the village authority. They include: the maintenance of public order; removals; the administration of cleansing oaths; most family matters (such as marriage, care of orphans, burial places, listing a deceased's property for the distribution of his estate); the observance of rights and duties of landholders; the sale or gage of fields and livestock; fixing dates of the ritual *kanduri* meals for the promotion of crops, etc. While in all these matters it is the headman particularly who is responsible for the protection of village interests, the *töngku,* who is often barely literate, takes care of the village prayer house (*mönasah*) and daily *sömayang* services, solemnizes ordinary marriages of women from his village, and he takes note of repudiations. He further collects the religious *jaköët* and *pitrah* levies,[6] and helps to find Arabic names at the ceremonial name-giving of children. He must also perform ritual slaughterings (for which he receives a piece of meat as a slaughtering fee), and bless the *kanduri* meals. He washes the bodies of deceased men, performs the funeral service for both men and women, recites

(for a fee) the leading prayer at the grave, and 'plants' the tombstones on a specified day after burial. In short, he is responsible for many activities (but not circumcision) under Moslem law, and for a few others prescribed by indigenous usage.

Usually the village headman has one or two helpers (*waki*) at his disposal. There are no village scribes. (—)

In the absence of village-owned land (—) its common property is the usually filthy village hall (*mönasah*) on stilts, the customary meeting place of the village council, which also serves as young men's quarters, guest-house, 'clubhouse', and, since the advent of Islam, as [*160*] a house of worship as well. Sometimes the village possesses a set of crockery for religious feasts, which is stored in the village hall. Since the abolition of road funds in 1908, village treasuries seem to have been established in some places. The communal rights in land, vested in the village, will be discussed below.

Village taxes (—) exist only in embryonic form: the modest cash levies, such as payments for assisting at marriages and burials (*hak katib* or *hak cupéng*; *hak tölökin*), go to the two official functionaries, *köcik* and *töngku,* who also enjoy various indirect benefits as well as some incidental income. A regular taxation in the form of services for the benefit of the village as a whole was unknown, but the headman could make a reasonable demand upon the service of his 'children'. On the basis of *mupakat* [common agreement] there was some co-operation in the making and maintenance of paths, fences and water furrows, but such labour was as irregular as it was light. (—)

Unless otherwise stated, all this seems to apply to the dependencies as well as to Aceh Major. Sometimes a headman is (was) in charge of two, three or four villages.

The above-mentioned pepper plantations, native market places (*ködè*) and toll-houses (*kaway*), each has its own headman without necessarily being an independent unit. (—) The toll-headmen were sometimes given a letter of appointment by the sultan if they were prepared to hand over to his tax collectors a part of the toll duties as *wasé* (*adat glé*, tribute). More remarkable as a rule were (and are) the activities of the plantation headman (*pötuha sönöbōk*). He often met the needs of his followers by giving them *pangkay,* an advance on their capital outlay. But even without this they were, at least during the first few years, obliged to deliver their pepper crop to him for less than the market price. The profitable difference was called *wasé pötuha* [headman's tribute]. A plantation headman who was the first to arrive in an

area, in course of time often became a chief (*raja*). Those coming after him remained *pötuha,* and had to give the new chief a certain amount per *pikul* [approx. 68 kilo] of pepper as *wasé raja,* part of which the [*161*] sultan again tried to seize as *wasé sultan.* But a *pötuha* in turn enjoyed as *wasé pötuha* the profitable difference between the reduced price for which his own followers had to sell pepper to him and the market price (less *wasé raja*) or the slightly higher price for which the chief forced the headman to sell to him. At a still later stage such a new chieftain would himself start plantations under headmen appointed by him, and if he had advanced them some capital he would reap, besides his *wasé raja,* also the capital levy or *wasé pangkay.* Nowadays both the amount of the pepper *wasé* (now an export levy on pepper, see p. 68, below) and the Government's share in it (i.e. the former sultan's *wasé*) are fixed by the administration.

Finally, it should be noted that, except for the administration of justice, the chieftain interferes with the domestic affairs of the village only in some cases of removals or in the alienation of rice fields (see below).

In the autonomous native districts (*mukim*) or little quasi-chiefdoms of Aceh Major, as in other *mukim* divisions [which are not jural communities], local authority rests with a *mukim* headman (*imöm*) whose position is normally hereditary. (—)

The administrative districts under district chiefs (*datōk*), into which our administration has divided the sparsely populated islets of Wè, Bröëh and Simölu, are of course not jural communities and have no connexion with adat law.

The indigenous government of the chiefdoms in Aceh Major consists of the chieftain (*ulèëbalang*) alone; in the dependencies it is often (e.g. all along the east coast) the chief with his divisional tetrarchs, each of whom has his own title: *köjruën, möntröë* (*mantri*), *cik, pakèh, bén*; in Lhōk Sömawè, *mbah raja* (not from '*maharajah*'); in Tönòm, *imöm.* The tetrarchs — *tuha pöët,* the 'four elders' — do not consider their hereditary titles inferior to those of the *ulèëbalang,* but the chiefs of Aceh Major rightly regard them as less dignified — just the reverse of the attitude of the Government, which turned the chief into [government] district officials while recognizing the tetrarchs as *ulèëbalang* [*162*] and petty monarchs (above, pp. 57-8). Each of the tetrarchs — their number did not always remain four — has to administer his own division of the chiefdom. They are therefore sometimes called *ulèë-*

balang cut, petty chiefs, and they have to be consulted by the chief on a number of traditionally determined matters concerning the chiefdom as a whole. In Rigaïh, on the west coast, they may be called *köcik* and their division *sagòë*; and in Lagöën, the chiefdom authority is referred to as 'the five chiefs' (*ulèëbalang limòng*).

The relative subordination of one chiefdom to another, which often existed (and still exists) as a result of more recently as against earlier establishment rights, is influenced by many personal factors; the government, however, is apt to transform this relationship into one of equality (Enc. N.I. IV:827).

The chiefs, too, practice *mupakat* with their subjects [i.e. ascertain the views of their people at public meetings].

In addition to the territory occupied by their villages, chiefdoms may also include the extensive stretches of wooded and hilly country which do not belong to the villages. It is not suprising that, on the flanks where the wooded interior rises towards the high Gayo- and Alaslands, chiefdom boundaries are usually ill defined or unknown. In any dispute concerning the extent of a territory the breaking in of land by people from one chiefdom is a powerful argument to support its claims.

It seems uncertain whether under adat law the shallow inter-tidal zone is considered to be part of those chiefdoms which are bounded by the sea. There are old warrants (*sarakata*) from the sultan recognizing as a chief's domain the off-shore zone 'as far as one can fish with drag-nets'. The tribute paid for such concessions by chiefs from the dependencies at the sultan's palace [at Kutaraja] or [after his flight in 1873] at Kömala, was called *jinamèë Aceh* or 'Aceh bridewealth'.

The positions of the chiefs and tetrarchs are normally hereditary. It is or was very common for a woman to assume authority during her husband's absence or in her capacity as guardian of her son in his minority. In recent years there have even been cases in the dependencies of succession by female members of a ruling clan. New chieftaincies can be created as well as new village headships, and both [*163*] dismissals and resignations occur. According to adat a territorial chief (including the head of a *mukim* or a village) may not at the same time be the head of a lineage (see below).

There is (was) a great deal of variety in Acehnese officialdom. Next to the chief one may find a relative called his *banta* or helper, being more or less what, before 1900, the *patih* in Java was to his superior, the regent. There are the *mukim* headmen in Aceh Major, Pidië, etc.,

and the tetrarchs and *waki* or deputies in the dependencies. At the ports, those 'centres of relative civilization and wealth in all Malay countries', are the *syahbandar* [toll-collectors]; at the estuaries a *kapala kruëng* to keep the waterway open, and a *pawang kruëng* to maintain a ferry service from which the headman shared the remuneration; at market places on the east coast *haria* to collect dues, and *panglima la'ōt* for export and import; *panglima prang* [military commanders] to collect *wasé* and taxes in peacetime; and finally, for any conceivable duty, from the humble carrying of messages to the important task of collecting taxes, the chief's retainers (*rakan*), whose homesteads are in the fortified courtyard (*kuta*) of their master.

It seems that many of these functions — which are likely to diminish in number and diversity under European influence — are normally hereditary. It is not unusual for such officials to rise to become chiefs in the dependencies.

Native scribes (*kranî*) for bookkeeping and correspondence were known to the more important chieftains even before our influence made itself felt.

A peculiar position among these officials is occupied by the Moslem *kali* [religious judge], who assists the chief in applying Islamic law. His function, like that of the village *töngku,* is (was) in practice hereditary. Some degree of literacy was required, however, and it was not rare for even the *kali* to find himself in need of enlightenment. They were formerly found everywhere in Aceh Major, where the *kali* of Lagöën, of Lhōk Sömawè and of Gödōng are especially mentioned. Their numbers have declined, however, for reasons which will be mentioned later when the administration of justice is discussed.

It is really only since our administration made its influence felt that the *ulèëbalang* and other chiefs can be said to have paid regular attention to the interests of their country and people. Their customary government therefore used to be far from popular. Although the chiefs [*164*] in the dependencies were for a long time treated as docile puppets, since 1908 it seems to have become the administration's aim to raise them to responsible local authorities. Chiefs' sons from the dependencies and Aceh Major are to be given more and better education at Fort de Kock. Considering, however, how the [appointed] mayors in our own country are still repeatedly being treated as subordinates by Ministers of the Interior, it should not surprise us if an Acehnese chief adopts the same attitude of lofty superiority towards village authorities as he adopts towards his own personnel. All lower

dignitaries collectively, from plantation and village headmen to the chief's helpers and tetrarchs, are apparently called *pötuha* [elders] (—).

[Adat] taxation in the self-governing chiefdoms of the dependencies is recognized by the Administration, and still largely bears the character of levies for the benefit of the chief himself. 'Largely', because in recent years the Government has rightly aimed at diverting the bulk of these levies and other revenues either to chiefdom treasuries, while compensating the chief, or to itself. (—)

As everywhere else, the adat levies are greatly varied and, where our administration has not imposed some order, quite arbitrary. The following may be mentioned: in chiefdoms with an estuary, a levy on each rudder going upstream (*wasé kuala*); a market tax (*wasé pökan*), now prohibited in territories under direct rule; transit duties at the borders of Gayoland; export duties *(wasé)* at the estuaries, like those on pepper, betel-nuts and forest produce (*wasé utöën*); a share in a hunter's bag; and estate duties (*hak pra'é*). Besides these, the avidity of chiefs and headmen has invented many other means of income: a share in the rice crop; levies on owners of dry rice fields (*wasé tanòh*), on boats (*prahu*) coming to anchor and on the sale of land; income tax (*wang harökat*) on independent pepper traders (additional to the pepper levies mentioned before); house 'tithes' (*usōy*); and the so-called reef-duty on jetsam, which caused us so much trouble in the past; etc.

[165] It has also happened that indigenous authorities sold or pledged their official functions.

The Administration has in many areas put an end to most of these arbitrary levies — of which formerly the sultans, too, demanded a share. In such cases the chiefs mainly retained an important share in our import and export duties, as well as their levies on pepper and betel-nuts. (—) In the past, however, the greatest source of a chief's income was the administration of justice, which will be discussed below.

Regular taxations in the form of stipulated amounts of labour for the benefit of the chiefdom were unknown in Acehnese adat law. (—) Both inside and outside Aceh Major, however, the population would give influential chiefs some gratuitous help with the building of their houses or fortifications, or with the cultivation of rice fields possessed or confiscated by them.

The armed forces of an Acehnese chiefdom were (and in the dependencies probably still are) based upon the large and powerful lineage

of the chief himself, reinforced by his various retainers — insofar as these chose to muster. The military commanders (*panglima prang* — not very important posts) were men who had distinguished themselves in battle, and in times of civil war slaves from Nias were often employed as warriors. How far a chieftain could rely on his army depended entirely upon personal and other considerations. We may laugh at such a miniature force, but in Acehnese society it made quite an impression.

In every chiefdom and independent native district (*mukim*) there are these peculiar officials whose task it is — similar to that of the [*166*] *töngku* or Islamic officiant in the village — to apply Moslem law insofar as it has acquired validity, and who may therefore be called Islamic religious officials. The *kali*, the official connected with the Moslem administration of justice, has already been mentioned. Apart from his duties as regards Moslem law in formal lawsuits, he also acts [as the woman's *wali*] in certain marriages (below, pp. 83-4). In addition to the *kali*, however, there is the personnel of the Friday mosque (*mösögit, sömögit*, where not only the daily services but also the Friday meetings are held). There are a fairly large number of these mosques, sometimes built inside one of the villages of a Friday community, sometimes standing apart. In Aceh Major there is, as a rule, one in every *mukim* division; but in the dependencies not always one in every chiefdom. Their personnel, when complete, comprises the *imöm* or keeper of the mosque, the *hatib*, who reads the Friday sermon, and one or more *biloë* (callers to prayer and sweepers) occasionally assisted by other functionaries. The *imöm* has no other function than to administer the mosque and its property, because all other functions are assigned either to the *kali* or to the village *töngku* — a situation entirely different from that in Java, where alle important functions under Islamic law were in the hands of the keeper of the mosque (*penghulu*).

The mosque personnel is (was) appointed by the chief (*ulèëbalang*). In view of their limited duties their income is small; the religious levies (*jaköët* or *jakat*; *pitrah*) in Aceh do not accrue to them but are for the benefit of the village *töngku*, the *ulama* or scripturists, and the holy war (*prang sabi*). Institutions like the mosque treasuries of Java are absent here. The religious official appointed by the Administration at Kutaraja under the Javanese title of chief *penghulu* is and was nearly always a non-Acehnese. Officially he is not connected with the principal mosque, but he acts as adviser to, and administers oaths in,

the *landraad* [government native court] instituted for non-Acehnese.

Of the very loose indigenous federations in Aceh Major and elsewhere it is difficult to say whether they have a discrete common government, territory and system of taxation. The principal head of the federation has, as the chieftain of his own territory, the usual powers of an *ulèëbalang*; as the head of the federation he has (and had) authority only in matters of government and justice involving common [*167*] interests. His *kali* was regarded as the chief *kali* of the federation.

Of the former sultanate [7] only a few traces are left in Acehnese institutions. Of these, the religiously inspired appointment of administrative *mukim* headmen in Aceh Major (p. 57) is the most important, although this has resulted in something different from the division in mosque districts which must have been the original aim. Outside the Aceh law area traces of the sultanate are found in the creation by the port chieftains of subordinate authorities whose name and number reflect the favourite numeral four (see village structure, p. 62; *tuha pöët,* pp. 65, 66). The reason behind these appointments must have been the realization of Aceh's neighbours that they ought to acknowledge their political subordination to this formerly powerful state, and that therefore the sultan's confirmation had to be asked for some of their representative headmen. How far the selection of these newly created representatives and tetrarchs was really determined by Aceh remains an open question. At any rate, some of these offices still exist, though their number has sometimes been altered: the six *kejurōn* or headmen of equal status in Gayoland, the two *kejurōn* in Alasland, and the 'fourfold *raja*' (*raja perempat, raja na opat*) in the countries of the Karo-, Simelungun- and Toba-Batak. The sultanic enclaves, founded in Aceh Major and in Pidië, and some other dependencies under headmen directly responsible to the sultan, no longer exist as such, most of them having become 'independent *mukim* districts' (above, p. 57). Each of these domains usually consisted of a complex of three *mukim* units, and was called *wakööh* district (not to be confused with *wakööh* in a Moslem sense).

There used to be (where exactly?) other places called *biböëh* or *wakööh* in Aceh. Their peculiarity was that, because of the presence of one or more widely revered *ulama* who were regarded as *biböëh* [inviolable, immune, see p. 61], the sacred law was more strictly observed than elsewhere, and that adat institutions in force in other villages were here set aside. Such communities were sometimes re-

cognized by the chief or sultan, but often they were founded without such recognition. The *biböëh* status was generally ascribed to such centres of Islamic studies as the village of Tirò in Pidië, but in Aceh Major all traces of the peculiar influence of these *ulama* soon vanished after our armed intervention.

[*168*] Finally, the present-day chiefs in the dependencies (Lhōk Sömawè, the Kaway XII, etc.), are an indirect outcome of the sultanate. Originally they were either collectors of the sultan's taxes (Moslem converts were preferred for this task), or they occupied such important positions as port headman or collector of the sultan's toll at one of the estuaries.

Administration of Justice

Under the adat law of this law area the indigenous administration of justice (fortunately not yet replaced by the judicial regulations of the *Aceh Reglement,* which are therefore irrelevant in this respect) did not rest with the village (*gampōng*), but exclusively with the chieftain (*ulèëbalang*). Even in federated chiefdoms the *panglima sagi* [principal chief] or his fellow chiefs each administered justice *only* in respect of his own chiefdom. A possible exception was the federation of Kaway V (sub-division Mölabōh), where there seems to have been a federal judge, the *tandi* or *waki* of the principal chieftain, who held court in the various chiefdoms of the federation, and whose decisions, it is reported, could not be revised even by the chief concerned. A second exception to the exclusive judicial power of the chief was found in some parts of the XXII *mukim,* where in minor cases a measure of judicial power was exercised by tribunals of three or four *mukim* headmen (*imöm*) in place of the chief. It is true that often the village authority, and in Aceh Major sometimes the headman of an administrative *mukim,* was and still is concerned with legal cases, but then only as an arbitrator seeking a compromise: the former with civil and criminal disputes within the village, the latter with disputes arising outside the village. But neither village authorities nor district headmen had real judicial power. Their conciliatory treatment of cases requiring no forcible execution of judgment or punishment was often sought, if only because it was cheaper, simpler, and no worse than justice at the hands of the *ulèëbalang.* Professional disputes arising between masters of fishing boats — usually about fishing in each other's waters — are normally settled by the leader of their guild (p. 59).

All formal administration of justice therefore rested with the chiefs.

When deciding cases also involving Acehnese from outside his territory, a chief used to consult the other chief — unless the matter had resulted in a wrangle, or worse, between them. In this respect our regulations [*169*] for the indigenous administration of justice have brought important changes, for we have introduced a federal administration of justice, similar to what is said to have developed to some extent in the area of Pasè, with its neutral court or *balè* at Bluëk. Under the queer name of *musapat* we created superior benches above the one-man chief's courts, with all the chiefs of a certain sub-division sitting jointly under the guidance of a government administrative officer. In their organization and actual practice these *musapat* courts have so far paid little attention to popular conceptions, partly because of the recommendation that the whole of our cumbersome, western-conceived procedural system be applied. The chief's administration of justice used to be no more popular than their government, and our concern with their jurisdiction was undoubtedly desirable (—). But we became somewhat overgenerous in our attention when we prescribed, at any rate for Aceh Major, that even a chief sitting as *judex unus* (at the *musapat* sessions) had to act under the eyes of the *controleur* [district officer]. Our administrative policy should rather heed the old-Acehnese adage: 'Keep him from erring, support him in righteousness, help him in distress, take him in hand when he may have overstepped the mark'.

For a knowledge of Acehnese adat procedure — the Acehnese are (rightly?) said to be lovers of litigation — the information is scarce. Regular court days seem to have been unknown. Court was held in the chief's *kuta* or at the place of misdeed. The village headman would escort (also in the dependencies?) the parties to the chief and explain the case, for which service he was given something by the judge. In matters of marriage law (marriage, orphans) or disputes concerning land or water (including boundary disputes) there seem to have been no fixed court fees. On the other hand, if the recovery of a debt was claimed (including inheritance claims), both parties were required to deposit an amount or thing to the value of the disputed claim. These litigation pledges (*hak gancéng*) were meant as security for obeying the judgment, and were returned by the judge after his decision had been [*170*] complied with. In such cases, however, the judge also imposed a tithe as remuneration (sometimes called *adat balè*) for his efforts, sometimes as much as one-half to two-thirds of the debts collected with his assistance. If the dispute concerned an offence punishable with a fine, the fine went to the judge. The chieftain-judge usually passed a

percentage of this to the *kali* (Moslem judge) if the latter had been an assessor. Judicial action against the chiefs themselves, for instance concerning the legality of their taxes, was of course inconceivable under adat law.

A fixed procedure seems to have been unknown in Acehnese adat law. Who initiated the process: the complainant or the judge? Could only the judge cross-examine, or also a litigant? Did the judge have the case investigated beforehand? In the chiefdom of Bungòng Talòë (Kaway V, sub-division of Mölabōh) there used to be a *pangulèë pönaròë* (= *bönaròë*) responsible for settling disputes, with a *pangulèë sidék* ('chief of investigations') under him. It has not, so far, been established that these titles reflected actual practice, or that elsewhere, too, there were officials under the chief especially responsible for the investigation of law suits. Torture and divine ordeals were not unknown as a means of investigation.

Though generally the course of adat process was not bound by strict rules, an exception was made in the dramatized theft process. Here, according to fixed rules (and upon payment, of course) the chief himself had to establish the fact at the place of misdeed, and to verify the identity of the thief (*pösah pancuri*); no other procedure was recognized. Would this still in any way be observed by our federal *musapat* courts?

Civil and criminal matters were not kept separate. The appearance in court of the aggrieved person as principal witness and not as litigant is of course incomprehensible to the population.

A few rules of evidence did exist. The normal means of evidence — apart from confessions, which were taken as sufficient proof — was of course the testimony of formal or casual witnesses. Formal witnesses were and are therefore required to validate many legal transactions (sale, etc.) permanently transferring the most important kinds of property (land, draught animals). Similarly, they are also required for the conclusion of a marriage. For this reason the 'send-off' (*pöngklèh)* of a daughter at the end of the bridewealth period (see pp. 86ff.) takes place with sacramental formulas at a ritual meal in the presence of the village authorities and guests. Likewise, the [*171*] last instructions (*pönösan*) given *in extremis* by a dying person should preferably be uttered in the presence of witnesses.

The position is different with casual witnesses or complainants. They have always been required to substantiate their testimony or allegations through some visible token (*tanda*), such as the blood-

stained knife, the pregnancy of a wife, a piece of clothing worn by the man accused by a woman of having molested her. Similarly, the clothes of a man who has died in someone's house away from where his wife lives, serve as *alamat* [identification] when she is informed of his death. The unsubstantiated [in this sense] evidence of witnesses in our court procedure seems to have been worthless in the adat process. For this reason fictitious tokens were sometimes used, which are no stranger than the tricks which enable the British to circumvent iron-clad rules such as those preventing the House of Lords from scotching a bill, or a member of Parliament from resigning his seat.

The administration of oaths to witnesses before they are heard is completely unknown to indigenous law, and is even prohibited in a religious court under Islamic law. The attitude of avoidance between son-in-law and parents-in-law, and the reluctance to mention one's proper name, are respected also in law. Indications of guilty behaviour are as important to the Indonesian as they are to us; but what we would construe at the most as a legal (adat) presumption of guilt — for instance, walking about in a strange village after nine in the evening when there are no festivities going on — is among them very often itself a punishable wrong. Documentary evidence, e.g. the recording of marriages, did not exist. Under our influence the age-old divine ordeals have disappeared from the formal administration of justice, but they still regularly occur in cases settled between parties. They were customarily used either to trace a guilty party or as a supplementary means to adduce proof. They were administered by the chieftain-judge, sometimes on individuals, sometimes on people collectively. There were no rules regulating the burden of proof, either in what we term civil cases or in what we regard as criminal cases. A person suspected of being in the wrong, or of having committed a crime, could therefore be required to take the cleansing oath, which was usually, on the instructions of the village authorities, administered in Moslem style by the Moslem officiant in the village *mönasah*. The Moslem oath consists only of a formless asseveration, while invoking Allah's name. The oath may be reinforced by reiteration or by [*172*] producing a Koran (e.g. by holding it over the head of the oath-taker), or — in Aceh as well as elsewhere — by administering the oath at a sacred grave (*kubu kramat*) which is to be found in the vicinity of practically every village. Although rules like ours concerning the burden of proof were unknown, a person whose property had been stolen and who wanted to claim compensation, or who had killed the

thief in the act, was nevertheless expected to prove that theft had actually been committed and by whom.

Nor were there any fixed rules as regards the execution of a declared judgment — e.g. restitution of land or chattel; payment of a thing or a sum of money; infliction of capital or corporal punishment. Who, indeed, could have forced the chief to abide by such rules? Seizure of property, where possible, was generally considered to be an obvious remedy and a matter of common sense. But seizure of the debtor himself, as a kind of bondage, appears to have been of little or no significance in this law area. Besides execution by the chief, private execution by the judgment creditor must have occurred. Execution of death sentences — at which the condemned had to wear a special dress — was formerly done by throttling or the sword. The idea that the Acehnese feared decapitation as the cause of a wretched existence in the hereafter is a fabrication. Fines imposed by the indigenous courts are under the adat due to the trial judge, but since the advent of our administration much of this flows into all sorts of illegal local funds of which the purpose is usually quite arbitrary.

A peculiar form of judgment execution is the 'banning' of rice fields (*langgéh umòng*). It served (serves) as a security for the payment of fines for wrongs committed against the person of the chief, his relative or his retainer, and consists in an order to the owner of the field, presented in the shape of a pole crowned with a young white palm leaf, forbidding him to cultivate his own rice field. The ban lasts, and the pole stays, as long as the debtor has not paid. If he delays payment a long time the chief will first have the field cultivated for his own benefit, and finally appropriate it. Likewise known was the banning of fishing boats together with their drag nets and other equipment. Whether these methods, known also in the dependencies, still exist to-day is uncertain.

[*173*] It was stated above that under adat law all formal administration of justice rested with the chieftains. A religious administration of justice, ranking *above* that of the chiefs, to which in theory people could appeal in reverence for the divine law, was therefore unknown among Acehnese legal institutions. An independent religious judiciary enforcing Moslem law existed *alongside* the justice of the secular rulers of the country only in the hey-day of 'the *habib*' Abdurrahman (approximately 1860 to 1870), when, at the latter's insistence, the sultan created a brand-new court at Kutaraja [8] under the name of *balè möhakamah* for cases concerning Islam — which, in Moslem terms,

means all cases. Within a few years, however, this court vanished for all time. What then is the function of the *kali* whom we mentioned earlier? He was occasionally consulted by the *ulèëbalang* on matters of religious law or entrusted with its application: sometimes as a mere formality in cases still governed by indigenous law; but as a rule seriously, as on the determination of the blood-price, and on aspects of family law and inheritance which, in the vast majority of Moslem countries, are traditionally left to the religious judge as the result of a division of responsibilities which, after the end of the 7th century, gradually evolved between the Moslem authority culminating in the caliph, and the Islamic scripturists who freely continued to interpret the revealed law but had to surrender the (non-)enforcement of a major part of it to the secular authorities.

In Aceh Major, responsibilities not taken away from the representatives of Islam included: judging the validity of a marriage, the functions of the emergency *wali* (an official marriage agent), the judicial dissolution of marriage (*pasah*) and calculating the apportionment of the estate. But there were also matters of family law and inheritance decided without the *kali*. This description also applies to the three principal *kali* in Aceh Major to whom the sultanate had tried to grant a privileged rank above other *kali*; to what extent the same was true in the dependencies depended on widely diverging local circumstances.

The influence of the *kali* therefore was comparatively even much less [*174*] than that of the *töngku* in his village, while his role in the administration of justice, in spite of his pretentious title (*kali* = *qādī*, judge),[9] bore but a very poor resemblance to the 'priestly justice' we instituted in Java before and after 1882. For even when exercising his limited jurisdiction, especially in matters of family law and inheritance, the *kali* did nothing without the instructions or specific permission of his chief, the *ulèëbalang* (he even needed the latter's powers of execution), and if the chief so ordered, the Islamic law remained in abeyance. Our Administration has (through ignorance?) wiped out the jurisdiction of the *kali*, with the result that all cases, including family and inheritance disputes, are now brought straight to the chief or the [federal] *musapat* court (p. 72). Nor is there any religious court beside the *landraad* (for non-Acehnese) at Kutaraja, but the chief *penghulu* (p. 69) is concerned, for the sake of the benefits involved, with marriage cases of non-Acehnese Moslems, in respect of which there are no official provisions.

Now that the chiefs of Aceh Major are sitting in the *musapat* court-

room nearly all the chiefdom *kali* seem to have disappeared. Only one *kali* (the original principal *kali*?) remains for the combined chiefdoms of an administrative sub-division, and he attends its *musapat* sessions merely as an adviser. In the dependencies matters have probably not yet proceeded quite as far.

From this description of *kali* jurisdiction it follows that there was no room in such cases for the distinctive, and purer, Moslem rules of justice. The income of the *kali* was determined partly by adat rates, and partly by the generosity of the chief (pp. 72-3).

Besides the traditional arbitration by village authorities and the traditional administration of justice by the chiefs there has, of course, for centuries been private redress of wrongs on a fairly large scale. Private redress is (or was until recently?) in the first place customary for such wrongs as bodily harm, injury or manslaughter resulting from ordinary quarrels. It then took the form of a revenge (*bila* [10] = blood- or other vengeance), executed by the aggrieved person (if still alive) with the help of his *kawōm* or lineage members. If they exceeded their measure (for instance manslaughter in retaliation for physical injury), [*175*] the *bila* case sometimes led to a drawn-out feud. Often blood-money was accepted in redemption of the right of revenge, in the more civilized areas even in cases of manslaughter. If the guilty party in a vengeance case fled to another place and the local people offered him asylum, the protecting village itself would take action if an attempt was made on his life. A much modified version of private redress is a kind of inter-village duel or mock-attack inside the village, called *adat mölangga,* practised for minor wrongs such as insults or disparaging behaviour. Lawful private redress is (was) also the slaying of a thief caught red-handed or afterwards, as well as the slaying of adulterers caught on the spot or — provided there is proof — later elsewhere.

If during the agricultural season, 'the season of the closed field' (about eight months between sowing and reaping), a cattle owner allows his beast to stray into a rice field, the owner of the field (also the share-cropper or pledgee?) may kill it without warning, but not cut it up. The same applies when cattle do substantial damage to fences or enclosed gardens and the owner of the cattle has failed to restrain them in spite of warnings.

Private redress was probably not unknown also in cases other than those mentioned above, for instance with regard to debts or land rights, possibly also in matters of family law and inheritance. So long as police and judiciary in this law area are not so effective as they are

in the Netherlands a certain amount of private redress, within the necessary limits and with necessary safeguards,[11] will have to be tolerated.

Seizure of a debtor's total assets, either under the court's supervision (i.e. liquidation in bankruptcy) or otherwise, is unknown to adat law. Joint action by creditors when the liabilities of an estate exceed its assets, also seems to be unknown (—).

Indigenous Legislation

Nowhere in Aceh has legislation — i.e. the deliberate formulation of rules and regulations — been clearly developed by villages or chiefs. The term *sarakata,* traditionally used for the regulations issued by the former sultans (—), also applies to the formal concessions (Javanese: *piagem*) which they granted to chieftains etc. in Aceh, or to the [*176*] tetrarchs in other areas (pp. 65-6).

The main subject of this section concerned what we would call constitutional law, that is rules relating to the constitution and powers of governing authorities. Of an administrative law, in the sense of enforceable rules to which these authorities have to conform when discharging their duties, there is of course nowhere any question in adat law. It is useful to know the normal practices of the chiefs with regard to taxation, administration of justice, and so on; but under Acehnese adat both the individual and the village are powerless against the chiefs. Only under our administration can this position be changed, and improved.

Adat Inter-local Law

Apart from the *adat mölangga* (p. 77), little is known of any kind of adat law applicable to the numerous and disastrous little wars waged between villages, often within the same chiefdom; between chiefdoms, often of one federation; and between chieftains, or even between pretenders to the same chieftainship. In such wars the so-called *wakööh* or exempted districts (pp. 70f.) of the sultan had to be respected, inasmuch as no fighting was allowed to take place on these neutral territories, and their neutral inhabitants were, for instance, allowed to remove the dead on behalf of both sides without interference. Nowadays such little wars can occur only when a whole region becomes disturbed again, as the Körötöë area in 1907. The light fences of the villages, and the heavier ones of the chief's *kuta,* probably indicate frequent warfare in the past. A right of hospitality for foreigners, or for Acehnese from

other villages or chiefdoms, did not exist, and the resulting lack of safety discouraged travelling.

Law of Kinship

The characteristic feature of the Acehnese law of kinship and the closely related law of marriage, is that they are based on [a system of double descent],* of which matrilineal and patrilineal remnants survive, overlaid and interspersed with elements of Islamic law. Marriage is based on jural equality: * neither the wife nor the husband is the sole owner of property accruing to their conjugal family; each of the spouses retains his or her own property, and during the subsistence of the marriage they have a joint right to property jointly acquired. Neither spouse requires the legal assistance of the other. Descent is not reckoned [*177*] through daughters only or sons only, but through both.

There is this important matrilineal survival: during the lifetime of her parents a married woman occupies her own house on the premises of her parents, or a part (if necessary, an annex) of their house, and her children are normally brought up here. Although the husband lives with her if he is a member of the village, or at least occasionally visits her ('coming home'), he is nevertheless to a certain extent a stranger in that house, as is shown in the relationship between him and his parents-in-law. As far as housing and subsistence are concerned a wife is virtually independent of her husband, and therefore not particularly concerned about the possibility of an easy dissolution of her marriage (by conditional repudiation). In short, for an Islamic country she occupies a fairly strong social position. If a young man marries outside his village his children are lost to it. Descendants in the male line usually live scattered in different villages; in the female line, the daughters nearly always live close to each other, either in one spacious house or on one residential plot, and the sons do so often.

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* [V.V. here used *parenteel huwelijk* ('parental' marriage) in the same sense in which he later employed *ouderrechtelijk* (lit. pertaining to parent-right), the latter term becoming accepted technical usage in Dutch adat law writings. Neither term lends itself to a literal English translation, but the meaning is clear from his text (particularly from his later description of Javanese marriage law, see pp. 169ff. below). Hoebel and Schiller (1948:170) used the Anglo-American classification 'bilateral' in this connexion in their English edition of Ter Haar, 1939, a term which is suitable with reference to ties of kinship and descent, but meaningless (if not worse) as a qualification of the legal aspect of a marital relationship based on mutual equality of spouses and families-in-law. In the latter sense, therefore, *parenteel* (*ouderrechtelijk*) has been rendered as 'jural equality' in the present translation. - *Ed.*]

Surviving traces of father-right, on the other hand, show up in the old-fashioned paternal 'clan' or *kawōm,* (pp. 62, 68-9) comprising the male descendants in the male line of a common ancestor, whose homesteads may therefore lie dispersed in all directions. They are the people who, in cases of insult, injury or manslaughter (very rarely of a woman) are responsible for taking revenge, for protecting against revenge, or for jointly providing blood-money (p. 77). In view of the numerous marriages between members of different *kawōm* this patrilineal survival may bring an Acehnese into sharp conflict with his sense of kinship and affinity with the relatives of his mother or wife, resulting from the prevailing bilateral system (—).

Moslem influence concerns the formal conclusion of marriages and the ways of dissolving them.

Kinship and marriage in Acehnese law are certainly not private matters: the village is involved in marriages and repudiations, and has some responsibilities (—) for the care of orphans (p. 63) — which is [*178*] also the concern of the chief.

As stated above, descent is along both the male line and the female, with this provision, however, that the family line (we would say: the surname) is reckoned through males. Consequently, in the family graveyards near the villages paternal kinsmen lie side by side with the married and unmarried daughters of the women of the family, while the graves of spouses are normally not found together.

However, great importance is attached to matrilineal descent; the people of the west coast, in whom there is a good deal of blood of female slaves and foreign women, are looked down upon (p. 61).

Legitimate are the children of a lawful marriage and, formerly, the children of a master by his female slave and concubine; all other children are illegitimate. The latter are not, partly as the result of contraception, abortion or infanticide, very numerous among the Acehnese. Means of recognizing or legitimizing illegitimate children are unknown. Legal adoption of children or adults, exchange of sons, and adoption of parents, are unknown. Children born of the not uncommon marriage of an Acehnese to the female slave of another (*anök möih,* 'children of gold', i.e. of property) were free under Acehnese adat law (but not under Moslem law), although their ancestry would be remembered for a generation or two. Children of married slaves were of course slaves. In conformity with Moslem law a concubine (*gundék*) was only regarded as legally married under Acehnese adat if she was the slave of her master. The legality of this marriage was based not on

a marriage contract but on the husband's right of ownership. Legal concubinage has vanished now that slavery has disappeared in Aceh. Illicit extra-marital cohabitation (usually by high-ranking men) is not excused in indigenous law. Illegal concubines are also called *gundék*. In spite of this, the illegitimate children of important persons, for instance, those begotten of a fifth wife, were often virtually considered to be legitimate.

Blood-relatives are in Acehnese called *waréh,* after the Arabic term for heir (*wārith*), but without implying any rights of inheritance. Maternal and paternal blood-relatives are sometimes classed together under the composite term *wali-karōng* (our 'family' in wider sense), [*179*] which implies, of course, only a kin-group and not a jural community as defined on pages 43, 48. There is no collective term for affinal relatives. There are a number of kinship terms which throw some light on kinship classifications in earlier times and which will be discussed later. Sometimes a person's near paternal relative is called his or her *wali*. The term derives from Moslem law, but its meaning has changed. In popular Acehnese usage it never implies the line of direct ascendants (father, father's father, etc.), or direct descendants (son, son's son, etc.), or one's brothers, but the male paternal relatives excluding those three groups. The widespread habit among writers on Moslem law of calling such persons agnates (i.e. the Moslem *wali* — a legal guardian or woman's marriage agent — or the Moslem *ʿaṣabāt,* male paternal relatives), cannot pass muster. In Roman private law, from which the term is borrowed, agnates include females as well as males; furthermore, agnation involves not only the question of descent, but also juridical ways and means in connexion with *potestas* and *manus*. Normally, the *wali* or bride's guardian is the paternal relative recognized as such by the religious law, as a rule her father or her brother, that is the very person who is *not* her *wali* in adat usage.

A person's near maternal relatives are his or her *karōng,* that is the ascendants and brothers, as well as the other bilateral male and female relatives on the mother's side.

Blood-relatives on the father's side who do not fall under the adat classification of *wali* have no distinctive generic name. Nevertheless, as said before, all blood-relatives from both mother's and father's side are classed together as *wali-karōng*.

Marriage Law

The rules of Islam predominate in Acehnese marriage law; marriage

customs, however, are governed by indigenous usage.

Prohibited marriages are mainly those prohibited by Moslem law. [*180*] Marriages of men with women of a higher class, for instance, the marriage of an Acehnese commoner with the daughter of a *sayyid* [descendant of the Prophet], or of a freed slave with an Acehnese woman, are permitted only with the consent of both the woman and the appointed *wali*. The converse procedure meets no objection, as Islam (like British nobility) takes the view that a man cannot make a misalliance. Definitely prohibited are marriages (*a*) between the near relatives mentioned by Moslem law, (*b*) of a man already possessing four wives, (*c*) with a woman within the *iddah* period [12] following the husband's death or the dissolution of the marriage during his life, and after her confinement if she was pregnant at the time the marriage was terminated, and (*d*) of a man with his thrice-repudiated wife, unless she had been married to another in the meantime.

There is no fixed marriageable age. Men usually marry when they are sixteen to twenty years old; girls are married (and used as wives, though with great care) at the youngest possible age, when they are eight to ten and sometimes only seven years old. Not prohibited, but considered undesirable in indigenous eyes, is the marriage of a girl before the betrothal of her elder sister, or of a widow or widower before the 'planting' of the deceased spouse's tombstone. Prohibited, however, are marriages opposed by the village headman for being against the interests of the village. (—)

Child marriages, that is marriages contracted at a very early age, but not consummated until later, are rare but do occur.

Individual freedom of marriage (subject to the above-mentioned right of the blood guardian to resist a marriage for reasons of class distinction) is a first principle under the religious law, and the personal consent of the parties is essential once they are of full age [13] (otherwise their consent or refusal is of no legal consequence). Besides this the Moslem law of the Shafiites gives the father or father's father the right [*181*] to overrule a woman (whether of full age or not) who is, or does not deny being, a virgin; as well as the right of overruling boys under age, though this is much less frequently exercised. Contrary to Shafiite law, however, there are (were) two other circumstances in which compulsion could be applied in Aceh. First, a young virgin without ascendants, who according to Shafiite law could not freely marry until she had attained full age, could be forcibly restrained by another blood *wali* after a 'change of rite'.[14] Secondly, in the past a

judge (chief) could compel a man proved to be responsible for a premarital pregnancy to marry the woman (though this was done much less often than in Java).

The celebration of a marriage in Aceh is governed by Islamic law, owing to — or at least connected with — the fact that the validity of marriages was submitted to the *kali*, whose judgment was based not on indigenous institutions but on the rules of Islam (p. 76). But in addition to this principal formality there is a multitude of indigenous customs and adat prescriptions: forecasts to ensure good fortune (divination); the functions of the respective parents; the activities of the respective village authorities or of the common village authority (pp. 63, 80); the solemny presented betrothal gift; the *pantang* inhibitions (p. 74) operating (though less stringently nowadays) from the time of betrothal between the son-in-law and his parents and the girl's parents; the betrothal period; the festive nocturnal procession to the house of the bride after the marriage has been celebrated according to Moslem law, as well as other customs observed subsequently.

In accordance with the principles of Islamic law a marriage is therefore regarded as a contract based on offer and acceptance (*ijab* and *kabul*, p. 12) — an anomaly in the system of Acehnese *adat* law, which has no separate law of contract. Parties to this contract are, on the one side, the groom, or if he is a minor his father, father's father, or guardian; and, on the other, the bride, who in a first marriage is almost always a minor. A *wali* or marriage agent must, however, always act on behalf of the bride. He is either the blood *wali* (father, grandfather or other patrilineal blood relative listed in order of priority in Moslem [*182*] law), or the *kali* (religious judge) acting as emergency *wali* or official marriage agent for brides of full age who have no blood *wali*, or, finally — in abnormal cases — the male person appointed as deputy *wali* by a groom or a bride of full age who has no blood *wali*. As a rule the blood *wali* lacks the knowledge required for the celebration of the marriage, and Moslem law therefore permits him to appoint a substitute for this purpose. But Acehnese adat law does not permit the appointment (*taḥkīm*) of any person other than the Moslem officiant of the bride's village (p. 63). Also the person appointed as emergency *wali* can be no other than this *töngku mönasah*. It is, however, an Acehnese peculiarity that the person empowered to be the agent of a virgin under age on account of the 'change of rite', or appointed for the rare occasion of the marriage of a virgin of full age, is not the village *töngku* but the *kali*. A woman is considered to be without a

blood *wali* not only when she has no such relative, but also when a competent blood *wali* does exist but is absent or unwilling to act.

Formerly, when unsafe and bad roads (pp. 78-9) frequently prevented the blood *wali* from reaching the marriage candidates, or the marriage candidates from reaching the *kali,* people were more often married by a deputy *wali* than by a *kali.* Although nowadays the roads are improved, the number of *kali* seems to have decreased (p. 77), so that the position has probably not changed very much. At Kutaraja, where there is no *kali* (pp. 69, 76), non-observance of the rule is presumably the general practice.

The celebration of the marriage (*pökatib, pönikah, pökawén*) by the village *töngku (*whose remuneration varies) usually takes place in the bride's village in the presence of the headman (who receives some remuneration — p. 64) in the village hall or in the house of some other Moslem scholar (*malém*); it seldom takes place at her own house. The conditional repudiation immediately after the celebration of the marriage, which is such an important and regular custom in Java, may in Aceh be dispensed with (p. 79). There is no fixed venue for a marriage by the *kali.* Both *kali* and *töngku* are sometimes themselves in need of instruction (pp. 63, 67). During the function everyone present sits on the ground instead of standing.

The validity of the marriage, including marriages at which someone other than the *töngku* or the *kali* has officiated (in which case such officiant is punishable under adat law), is judged solely by the rules of Moslem law. These rules require: the absence of marriage disabilities; the assistance of a legally authorized *wali*; the presence of two [*183*] lawful witnesses (in Aceh usually two pious men, *löbè,* as professional witnesses from the bride's village); offer and acceptance in terms which unequivocably mean marriage; and the absence of special conditions. No mention need be made of a marriage gift. The husband is under Islamic law contractually bound to make his wife a marriage gift, but if the amount is not specified in the marriage contract it will be determined later in accordance with local custom and the wife's social status (p. 61).

The marriage relationship has this peculiarity (p. 79) that, after about half a year, the husband (*lintō*) follows the wife (*prumòh*), that is, moves in with her, in her own house or on her family premises; or at least — if their parental (maternal) villages are far apart — he goes to stay there periodically, so that he may express with the adat courtesies expected from him after his marriage that he has accepted

his in-laws' village as his home. Dignitaries like chiefs must of course continue to live in their own area, and if they have to look for a wife of their own standing in some other place, they are therefore unable to pay her more than an occasional short visit. Prospective village headmen should preferably marry within their own village, but if they do not, they are in exceptional cases permitted to take their wives to their own village. Under adat law it is therefore not only impossible for a husband to force his wife to follow him outside her place of residence, but she is not even allowed to do so of her own free will (p. 60). A husband is not obliged to have marital intercourse with his wife, at least not under Moslem law; but if he has more than one wife he is obliged to pay each of them regular visits of the same duration. Under the same law he may, within the limits of propriety, demand conjugal intercourse and obedience from his wife; but he may not burden her with domestic chores unless she agrees, which she usually does. The blood *wali* mentioned earlier merely has to assist with the celebration of the marriage; he has no authority over the woman, not even if she wants to take action against her husband, and he cannot, therefore, be called a guardian.

It would be interesting if an older form of indigenous marriage could be clearly recognized behind this Moslem marriage, but the traces of the past are no longer distinct. As a survival of a patrilineal stage with its characteristic marriage-by-purchase, there is the bridewealth discussed below, which formerly must have been a 'purchase [*184*] price'. Closely allied to this marriage concept is the 'substitution marriage', still expressed in the condition that, if the 'purchased' wife dies within the 'bridewealth period' (see below) the deprived husband is offered, after the grave-stones have been planted, a sister or other closely related substitute by her family. Such a substitution marriage (*pulang balèë*) must again be solemnized in Moslem fashion, but of course no new 'purchase price' is paid (although it is mentioned as a mere formality). If this marriage does not take place the husband is refunded half the 'purchase price', the so-called widower's due (*hak balèë*). If, however, the wife dies after the bridewealth period, the husband is not considered to have been deprived of his due, and there is no question of substitution. There is, furthermore, the even more faded vestige of the right of the husband's heirs to inherit the 'purchased' woman. If the husband dies during or after the bridewealth period — which is therefore irrelevant — his male blood relatives or *wali* offer the widow (if she is still eligible) a

new marriage, either with one of them or with a candidate selected by them, preferably from their own family. Under present-day adat law she is, however, not only absolutely free to decline such a succession or brother-in-law marriage (levirate, hence without 'purchase price'), but to marry any other man or not to remarry at all. Presumably also related to an older patrilineal constitution of the Acehnese family is the claim to a deceased man's children made — as a matter of formality — by his *wali*.

The law of matrimonial property in Aceh concerns in the first place a number of gifts made before, during or after the contracting of the marriage. The principal gift is the bridewealth (*jinamèë*),[15] which is nowadays alternatively reported to be due to the bride's father (or parents) or to the bride herself. Payable by the husband, the gift is apparently a fusion of some old-Acehnese 'brideprice' (purchase price, due to her owner-father), and the 'bridal gift' of Moslem law (due to the bride herself — p. 84). The amount of the bridewealth depends [*185*] either on mutual agreement or on the social standing of the bride. Under adat law this is fairly precisely laid down — at least for virgin brides — for each of the different social classes (it used to average between 25 and 100 dollars; how much now?). For this reason it is seldom mentioned in the marriage contract of a woman marrying for the first time. The amount is usually paid (put down) by the bridegroom when the contract is being concluded. The custom in some areas of returning one-half of the bridewealth to the husband is only a formality, for within a few weeks this part is again received by the bride (if she is still a child, her parents will of course use it, actually or ostensibly for her benefit). Yet it is not uncommon for important folk or their daughters actually to give back even the full bridewealth after the marriage contract has been concluded. It seems that refund of half the bride-price to the bridegroom may be interpreted as a (fictitious) payment enabling the parents to buy from the husband the privilege of retaining their interest in the 'sold' daughter; or, indeed, of allowing them to keep her as a child-at-home for a period of which the length increases with the amount of money refunded. However, the legal consequences of such refunds nowadays also occur where the refund itself, even as a formality, has fallen into disuse. The 'bridewealth period' — the period of the refunded bridewealth would be a more appropriate name — will shortly be discussed in another context.

Prior to the bridewealth the bridegroom pays the betrothal gift (*tanda kòng narit*, 'token that the given word is binding'), for instance,

a valuable gold ring or an ornament for her hair. This is for the bride herself and remains her property when the marriage goes through. For this reason the term 'betrothal gift' seems to be more correct than 'betrothal pledge', which might imply that it must be returned after the conclusion of the marriage. Should she be responsible for breaking the engagement she has to return the gift; in the opposite case it remains hers.

Apart from other cash gifts (such as the monthly *biaya*), or gifts of clothes (*sönalén*), the defloration gift or morning-gift (no special term) may be mentioned — a girdle, bracelet or ring — which also becomes the property of the wife. All personal ornaments of the spouses, except the two mentioned above and the wife's essential clothing, are regarded as the property of the husband.

[*186*] Besides these marriage gifts, the law of matrimonial property involves, in the second place, the earnings of the spouses, and what they bring into the marriage. Everything the husband brings into the marriage (his patrimony, *atra bak ku*) remains his property, even if it takes the form of gifts to his wife (excluding only the above-mentioned betrothal and defloration gifts). Everything the wife brings into the marriage (her patrimony, mainly such property as she obtains at the end of the bridewealth period, the two gifts, and often the bridewealth as well) remains her property. Husband and wife keep their respective properties carefully apart, and take good care that they have the necessary witnesses. In areas where the wife usually assists her husband in his livelihood, such as agriculture in the upper regions of Aceh Major (and in the dependencies?), all property jointly acquired during the subsistence of the marriage becomes their common property (*atra* or *laba siharökat*; *atra* or *laba möcarikat*); upon the dissolution of the marriage this common property is divided into two equal parts. What each spouse acquires during the marriage through individual efforts or from personal sources (e.g. inheritance) belongs to him or her respectively (individually acquired property — no special term), although it does sometimes happen when a marriage is terminated that property so acquired is nevertheless regarded as having been jointly acquired.

The law of matrimonial property concerns, in the third place, the maintenance of the wife during the two periods into which in Aceh her married life is divided. During the first period, the 'honeymoon' (*janji jinamèë*, 'bridewealth period'), the woman is according to adat law still supported by her parents (by whom if they die?), and the husband is obliged only to bring her a monthly 'gift' in money (*biaya*)

together with a number of other small presents in cash or meat as prescribed by adat (—). The length of this period depends, as explained earlier, on the amount of bridewealth: a full year for every *bungkay* (thirty guilders' worth) of gold or, more accurately, for every one-half *bungkay* of the refunded portion of the bridewealth. The end of the bridewealth period is solemny proclaimed (p. 73) if her parents, or one of them, should still be alive.

[*187*] During the second period, unless the woman foregoes her rights (as she often tacitly does), the husband is under Islamic law obliged to provide his wife with food, clothing, housing and service commensurate with her social class, which as a rule is not above his own. The costs of the first confinement are borne by the parents of the wife; the responsibility for planting the tombstones rests either upon her parents or on the husband himself.

The dissolution of the marriage — comparatively rare in Aceh, owing to the woman's independent status and her matrilocal residence — is again purely a matter of Moslem law (—). The three methods therefore are: repudiation (*talöëk*) by the husband, the buying (redemption) of his right of repudiation (*töbōih talöëk*) by the wife, and divorce (*pasah*) by the court.

A husband may repudiate his wife without legal grounds, and the repudiation may be twice revoked (within the *iddah* period — p. 82) and repeated by him. In Aceh the repudiation is usually uttered three times in a single pronouncement and such triple repudiation (which is not in conflict with the religious law) then becomes immediately irrevocable. This kind of repudiation is rare, and usually based on continuous and irreconcilable domestic disagreement (it is often requested by the wife herself, gently — or not so gently — pressing her husband). Repudiation on account of having wearied of the marriage is extremely rare in Aceh, except among chiefs and royalty who have married women of the lowest social class in order to avoid living in actual solitude (these legitimate wives are often wrongly called *gundék*, concubine — p. 80). Such a repudiation is expressed symbolically by giving three pieces of betel nut in succession, after which the Moslem officiant of the woman's village will be notified (p. 63); or it is done without any formality, when it must be followed by a letter of repudiation (*surat talöëk*) from the husband to the *töngku* of a neighbouring village, requesting him to report the triple repudiation to the authorities of the woman's village. Because of the regular use made of the triple repudiation the legal question of whether or not a repudiated woman

[*188*] should be regarded as a wife during the hundred-odd days of the period of revocation will only seldom arise, but in view of what Moslem law prescribes with regard to inheritance (Juynboll, 1903: 254), the answer might be yes. Revocation (*rujuk*) is therefore rare in Aceh, and the rules pertaining to it are little known. But a husband may not re-marry his thrice-repudiated wife unless she had been married to another in the meantime. Conditional repudiation of a wife by her husband is permitted under Moslem law. It occurs also in Aceh, but certainly not as a regular custom at the celebration of virtually every marriage, as it is in Java (—).

Likewise, the buying of the repudiation (based on the idea that the husband 'owns' three repudiations and can sell his right to his wife) is only rarely necessary. It conforms to Moslem law, but occurs only in the lower social strata. According to local usage its normal price is twice the bridewealth, and must be paid by the wife or some other person before the dissolution of the marriage can become effective. The buying of the repudiation bars any revocation, and therefore permanently dissolves a marriage [threatened by the husband's repudiation].

Pasah, divorce by a court of law (i.e. by the *kali* with the approval of the chief, and nowadays by the government *musapat* court), may be granted at the instance of one of the parties (in practice, the woman; for a husband, repudiation is a much simpler method). It can be obtained also in the absence of the husband. It may be granted on a limited number of grounds (e.g. on the rare occasion when a woman can prove her husband's inability to provide for her, and that she herself has also been unable to make ends meet); but the *kali* sometimes exceed these limits when granting *pasah*.

A woman whose marriage has been dissolved in any of these ways, or by death, is called *balèë* (a term with a wider connotation than 'widow' with us); the same term applies to a man in a similar position (cf. *hak balèë*, p. 85).

If, as regards *children*, the Roman distinction between *impuberes* and *minores* is applied, only 'impuberty' (childhood) would be known to Acehnese law, and not the more advanced stage of minority [see note 13, p. 279]. Children legally under age are divided into young children (below the age of seven to ten), and older children.

Children are in the care of both parents, though in practice the mother and mother's family usually have a greater influence on their education than has the father, who is often away from home (pp. 79,

84-5). Motherless children usually stay with their mother's mother, and [*189*] are cared for by her and their father; or if the mother's mother is dead, they live with their father and under his care. During the mother's lifetime, and afterwards, the father is always entitled to take his children, but rarely does. Fatherless children not of full age are usually, with their property, in the care of their mother. If they are still young they stay with her when she remarries, but if they are older they may choose to stay with their father's family. Only in a leviratical marriage (p. 86) can the step-father exercise any paternal authority over them. Children without parents are cared for, with their property, by their father's brothers, unless the chief, induced by greed, takes over the care of their property; in that case, however, the children themselves are actually left in the care of their family. Whether this 'caretakership' of the chief (to compare it with State guardianship would be unduly flattering) nowadays still exists in Aceh is uncertain. Guardianship or supervision by Moslem officiants is entirely unknown to adat law. Finally, children whose parents' marriage has been dissolved go as a rule to their father, who therefore has a better right than Moslem law would have granted him.

If in all these cases the children concerned are young, their paternal male relatives or *wali* (see p. 81, above) will — both upon the father's death and when the mother remarries — stage a mock effort through the village headman to obtain control over them and their property, and the *wali* continue to keep a watchful eye after the mother remarries, unless the second husband happens to be a levir (—).

Indigent orphans receive some support from the *pitrah* collections (pp. 63, 69).

Guardianship over chiefs too young to rule (p. 66, above) involves not only the responsibility for their person and property, but also the exercise of government on their behalf. Provisions for this are therefore always made. Such political guardianship, sometimes by tetrarchs (pp. 65-6), constantly leads to intrigue and attempts at usurpation.

[*190*] The legal coming of age ('majority') coincides, it seems, with actual puberty, and therefore varies from one individual to another; marriage may precede this stage (p. 82). But so long as a person of full age lives unmarried in the house of his parents he remains of course more or less in their care and under their control. Unmarried young men spend the night in the village hall. A newly married daughter continues to live in her parents' house or on their residential premises remains in their care until her 'send-off' (*pöngklèh*) at the

end of the bridewealth period (pp. 73, 87). She is then released — at least for the duration of that marriage. At its termination she presumably returns to the care of her parents if she has no children.

There are no rules prescribing how a guardian should account for his administration. There is much corruption in such matters, especially when the chief himself has been in charge of affairs.

There is no provision for the care of property belonging to absentees without relatives to look after it (—). Such property only too often falls under the control, that is, into the pockets, of chiefs who also in former times were only too eager to appropriate abandoned lands (wet rice fields or plantations).

Law of Succession

Things considered to be heritable are, on the one hand, the official functions of the deceased and, on the other, his material assets after debts owed to or by him have been paid.

Nearly all official functions in Aceh (pp. 62, 65-7) are hereditary. The heir is the eldest capable son; failing sons, the nearest male blood relative (brother, etc.), and sometimes a female blood-relative (p. 66). An alternating succession — whereby the head of branch A must be succeeded by a member of branch B of the same family, and the latter again by a member of A, and so on — is reported only from the self-governing chiefdoms of Mörödu. Questions of who the first eligible blood relative is, and whether he has the necessary qualities — i.e. whether he is intelligent enough, and not addicted to opium, or suffering from other moral or physical disabilities which would render him unfit — are sorted out by the most influential people of the federation, chiefdom or village concerned. In respect of the office of *kali,* which always requires some degree of literacy, the demands of ability would, of course, more than in the other offices override the [*191*] principle of heredity, and the chief would see to this. As regards the headships of *mukim* divisions and lesser offices, the chief had the right to appoint and dismiss functionaries, and not infrequently asserted his power. The chiefs themselves, despite their hereditary rights, used to covet a deed of recognition (*sarakata* — p. 78) from the sultan as an embellishment of their office, and they were prepared to pay money for it (p. 66).

For Aceh Major it has now been laid down (ISb. 259/1899, part X) that native authorities are appointed by the Administration, 'if possible with due regard to old-Acehnese institutions and customs'. For this

purpose our administrative offices keep a record of the genealogies of the chiefs and headmen. For obvious reasons this adat system of selective heritability serves us well. There is no such provision with regard to the Moslem adviser appointed by the Governor to the government *musapat* court in Aceh, whose function is comparable with that of the *kali* or principal *kali* (p. 77).

Should the successor of a chief, *mukim* headman or village headman be a minor, he holds office under the supervision of a male blood relative. Formerly this happened as a matter of course on account of the latter's guardianship (p. 90). Nowadays the Administration expressly appoints him as an acting-chief, etc. As regards the [religious] office of village *töngku* such acting appointments are (were) highly exceptional.

A deceased person's body is in a certain sense also inherited, in order to bury it in the burial place (*bhōm*) of either the wife's or the man's family, depending on the circumstances. But if the deceased had on his deathbed expressed his last wish (*pönösan*) as to the place where he desired to be buried, this was usually respected.

The division (and administration?) of the material estate (*pösaka*) is held over until all principal matters connected with burial, especially the 'planting' of the tombstones, have been completed, that is, often until the forty-fourth or hundredth day. If the deceased was married, the estate includes, in addition to property brought into the marriage or individually acquired, one-half of the jointly acquired property mentioned earlier (p. 87); the other half is not inherited but merely handed over to the surviving spouse as his or her property. The division of the estate takes place only after payment of the deceased's debts, which may necessitate the conversion of his assets into cash. These debts include unpaid funeral expenses, which for men are not [*192*] seldom paid by the widow, and in the case of a woman dying within the bridewealth period usually by her parents (p. 88). Also included are often some debts to Allah, that is, money for a substitute Mecca pilgrim; or religious fines (*padiah,* usually paid in rice) for having failed to attend Moslem services, which fines are handed over to the mosque officials or to the pious or learned 'indigents' (*löbè, ulama*). If the estate is insufficient, or barely sufficient, to meet the debts there is no inheritance; the remaining debts are, it seems, regarded as the creditors' loss, and are not transferred to the heirs. The blood relatives therefore need no legal protection against such debts. What remains of the estate after the debts have been deducted and the

outstanding claims collected is nearly always inherited on intestacy, and only very rarely in terms of a last oral or written will (*wasiët*) according to Moslem law. Such a will may dispose at the most of one-third of the net estate in favour of persons other than those named as intestate heirs under the religious law. Nevertheless, it has been reported — of chiefs for instance — that sometimes an entire estate is bequeathed to a person not so entitled (e.g. an illegitimate son by a concubine — p. 80) by means of a European testamentary disposition — the validity of which, however, is highly doubtful. In view of the rarity of wills there are of course no adat rules concerning any inviolable legal portions.

The heirs on intestacy (sometimes called *waréh,* in an entirely different sense from *waréh* = blood relative — see p. 81) are, with one important exception (below) those listed by Moslem law.

Roughly indicated they are,

a) *if there are sons or sons' sons*: the surviving spouse, the father (failing him, the father's father and father's mother) and the mother (failing her, the mother's mother), all these being 'Koranic heirs' who cannot be excluded; the residue to be divided among the sons (the *ᶜaṣabāt* proper) [16] and their sisters if any (*ᶜaṣabāt* by legal interpretation), or (failing sons) among sons' sons and their sisters, with a daughter or son's daughter getting one-half of a son's or son's son's share;

b) *if there is a father but no son or son's son*: the surviving spouse, [*193*] the father and the mother (as under *a*) who cannot be excluded, and the brotherless daughters as ordinary Koranic heirs; of the residue either two-thirds goes to the father (*ᶜaṣabah* proper) and one-third to the mother (*ᶜaṣabah* by legal interpretation), or all of it to the widower-father;

c) *if there is also no father*: the surviving spouse, the father's parents, the mother (failing her, the mother's mother), and the brotherless daughters and son's daughters as Koranic heirs; the residue to be divided among the brothers (*ᶜaṣabāt* proper) together with the father's father if alive (being *ᶜaṣabah* proper as well) and the sisters if any (*ᶜaṣabāt* by legal interpretation), with a woman again obtaining half a man's share;

d) *if there are also no brothers*: the surviving spouse, the father's parents, the mother (failing her, the mother's mother) and the brotherless daughters and sons' daughters as Koranic heirs; the residue to be divided among the father's father (*ᶜaṣabah* proper) and the sisters

(*ᶜaṣabāt* by legal interpretation). If, *failing also* the father's father, sisters, or paternal collateral relatives, or when (failing only the father's father, daughters and sons' daughters) the sisters act as Koranic heirs, then the unapportioned residue is (in the absence of a lawful Moslem 'treasury') distributed equally among the Koranic heirs (excluding the surviving spouse).

If there are neither *ᶜaṣabāt* nor Koranic heirs, the estate is (was) appropriated by the chief. The village therefore has no right to inherit. The complete rules of Mohammedan intestate succession are described by Juynboll [1903] and Sayyid Usman.[17] (—)

The above-mentioned heirs receive in fact the shares allotted to them by the religious law. The surviving spouse therefore obtains, besides the moiety now available to him or her of the jointly acquired property (pp. 87, 92), also his or her legal portion of the deceased's estate.

In the distribution of the estate some account is taken of gifts (*pönulang*) made by the deceased during his lifetime to his children — or in rare cases to other heirs — so that those who have received proportionately more gifts get less from the deceased's estate. For this reason it is ceremoniously stated how much a married daughter has been allotted when she is 'sent off' at the end of the bridewealth period.

[*194*] The one significant deviation from the Moslem law of intestate succession is the right of inheritance of the spouses. Under Moslem law the widow or widower cannot be excluded as a Koranic heir; according to Acehnese adat law, however, the spouses do not inherit from one another if either dies within the bridewealth period, when the newly-married wife lives at her parental home (p. 84f.). Should the woman die within this period, the husband can only claim either one-half of the bridewealth (the other half having ostensibly been refunded — p. 86) or a near relative as a substitute for the deceased wife without additional payment (p. 85). Should the husband die within this period the wife is paid the value of the (refunded) half of the bridewealth (now therefore regarded as a gift to her personally — p. 87), while in numerous cases, even if the husband dies at a later stage, his *wali* will offer her a new husband in exchange for the deceased.

Only very insignificant estates are wound up by the members of the family among themselves.[18] In every other case it is done by the chief (even today?), who is informed about the available assets by the village headman and its Moslem officiant, and by the parties concerned. The chief has the assets valued with subtraction (and payment?) of debts, after which he deducts (also today?) ten per cent for himself as 'estate

duty' (*hak pra'é* — p. 68), of which a small amount is given later to the *kali* or [other] scripturist and to the two village authorities. The chief then proceeds to instruct his *kali,* or some other scripturist in his service, to assess the heirs' portions in terms of money (p. 76). After this it is the task of the two village functionaries to see that, with the chief's authority and in accordance with these assessments, the possessions of the deceased are fairly allotted to those entitled to them. Rice fields and weapons are preferably given to men, houses and residential plots to women, and, where possible, all allottments are made in accordance with the wishes expressed *in extremis* by the deceased (pp. 73, 92). Public auction of estates is unknown, and there is no general rule for any distribution among creditors if liabilities exceed assets (pp. 78, 92).

Estates of non-Acehnese dying in Aceh without having established a [*195*] family there were summarily appropriated by the chief because it was, or was supposed to be, too difficult to trace the heirs. Likewise, legacies due to absent Acehnese, and the estates of Acehnese who died without legal heirs (above) often found their way into the pockets of the chief.

Land Law

This heading deliberately speaks of land law (that is the objective law relating to land and water), and not of the law of things. A division between real and personal actions, or between rights *in rem* and rights *in personam* (—), is as unknown to Acehnese adat law as to any other adat law in our archipelago. What is known instead, in Acehnese as well in most other adat law, is the distinction which emerged already in our discussion of the indigenous administration of justice (p. 72f.), that is between rights in respect of land (and water), the law dealing with chattels and obligations, and, sometimes, the law of wrongs.

An analysis of the objective law relating to land and water in the Acehnese law area must first of all pay attention to the right of avail,* which has no specific indigenous name. It is the right of an indigenous jural community to control and utilize a certain expanse of land (both cultivated and uncultivated land) or of water for the benefit of its own members and of outsiders (the latter often having to pay a levy). This right is usually coupled with the community's liability for any incidents

* [For an explanation of this technical usage, see note 2, p. 278 - *Ed.*]

occurring within this area. Uncultivated land may here mean uninhabited land (*rimba*) covered with primeval forests or wild grass on or near the mountain slopes or watersheds; or the forbidding wild tracts (*rantò*) which on the west coast separate one settlement from another; or the thin forests in the lowlands; or, finally, the untilled plains (*padang*) which in the lower and not yet fully occupied regions often surround the complexes of village fields (p. 62). In respect of *rimba*, [*196*] *rantò*, forests and water resources, a right of avail as defined above exists in that a chief in control of an estuary in the dependencies can exercise this right as far as the 'blue mountains' of Gayoland and Alasland (boundaries often not being accurately determined until after a conflict arising, for instance, from making a pepper garden, or building a village, or finding a corpse). The gathering of wood, rattan, latex, resin, bees-nests, honey, wax, fruit and other forest produce, as well as mining and digging, hunting and fishing, and the clearing of virgin land, are allowed only with the knowledge or permission of the chief — hence, for instance, his share of a hunter's bag (p. 68). As regards the forest belt stretching between Gayoland and Aceh (p. 56) no right of avail or any other land right is being exercised; there is a recognized boundary only for the purpose of allocating liability for wrongs.

In Aceh Major the right of avail of the village over its surrounding plains (*padang*) shows signs of fading away; in the first place — as has happened in the Priangan [West Java] — because not only the members of the village concerned, but also those of the other villages of the neighbourhood (i.e. of the same *mukim)* can, without asking permission, reclaim this land (they rarely do so) or use it for grazing or making gardens; and further, because the responsibility of these villages for untoward incidents on their *padang* seems to have disappeared from the adat law — even though, until recently, villages throughout Aceh, as well as chiefdoms in the dependencies, were held collectively responsible (and sometimes fined) by our administration (see Law of Wrongs, below). It is not clear whether the Government will in the future take this right of avail into consideration in the event of European mining and forestry activities. The *wasé* paid locally by the Royal Dutch Oil Company and by a timber company might be interpreted as a recognition of the right of avail of [the chiefdom of] Pörölak (p. 68). Contrary to what one finds in Bali, for instance, there seems to be as little left here as in West Java of a weakened or dormant right of avail over lands cultivated and held in adat-ownership [p. 97,

footnote]. However, the fact that land transactions are considered to be matters concerning the village is probably a remnant of this right. Likewise, the peculiar right of all villagers freely to graze their livestock on the fields (*blang*) of their fellow villagers during the 'season of the open fields' [i.e. the period February—May separating the end of one agricultural season from the beginning of the next] may point [*197*] to a village right of avail which preceded the reclamation of such lands. This grazing right does not prevent a field-owner from using his land for secondary crops in the meantime, provided he puts a fence around it as a protection. (—)

One wholly irregular variant of this right of avail is the right which the sultans used to arrogate to themselves in respect of a strip of land seven fathoms wide on both sides of the river Aceh. On this strip the sultan suffered his subjects to build and cultivate (apparently without having to ask his permission) on condition that the land could never become their adat property and that he could at any time terminate their tenancies at will. Nowadays, however, these strips of land (*tanòh raja*; also called *wakööh* because they were partly excluded from normal legal commerce) seem to be free from this encumbrance.

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Though there still are extensive virgin lands in the undulating highlands of Aceh Major and the dependencies, in the sparsely wooded lowlands of Aceh Major, in the more level parts of the highlands and in large tracts along the north and east coasts, virtually all land has been taken up for the production of rice, sugar cane, pepper, betel nuts and coconuts. It is here in particular that we find the right of adat-ownership * in respect of land and water, a right second in importance only to the right of avail. (—) 'Ownership', because in view of the [*198*] concepts and state of development of adat law this right fulfils a function comparable to that of ownership in western law and legal thought; 'adat-', to avoid the erroneous impression that this right has a western connotation or corresponds to 'dominium' in Roman law (—).

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* [Van Vollenhoven uses the term *inlandsch bezitrecht* (lit. native right of possession), adopted from section 62 of the *Regeringsreglement* of 1854, and points out on page 198 that the predicate is necessary because, substantively, this right differs from both *possessio* in Roman law and *eigendom* (ownership) in Dutch law. For much the same reasons the term has here been rendered as 'adat-ownership' (hyphenated in order to stress its distinctive connotation and cultural context). In the next (paraphrased) sentence, therefore, 'ownership' and 'adat-' have been substituted for respectively '*bezitrecht*' and '*inlandsch*' of the original text. - *Ed.*]

To the Indonesian this adat-ownership represents the most comprehensive, and after the right of avail the strongest conceivable, title to land.

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Adat-ownership (only its name, *milék,* is of Arabic-Islamic origin) is the right to treat a thing as your own property. In respect of land it is restricted by the [communal] right of grazing (p. 96f.) and the right of first option (below, p. 100). It does not, however, involve the liability to pay tax in labour or money (as it does in Java); nor is village membership a requirement, for it is possible (though rare) for a person to have rice fields in another *blang* [cultivation area] than that of his own village. The things subject to this right can include wet or dry fields (rice fields, etc.), plantations, residential plots and crops (which may be owned even though the cultivator does not hold the land itself in adat-ownership, as on the *padang* or on the riparian *wakööh* [*199*] strips mentioned earlier), as well as fish ponds and fishing basins. Houses are not included in this category (see p. 106, below). Fish ponds (*mòn öngkōt*), made in the rice fields and emptied from time to time, are usually not separately owned, but it does occur that a field-owner sells his pond while retaining his field, or retains his pond upon transferring his adat-ownership of the field. Fish ponds can also be transferred by inheritance. The fishing basins along rivers and creeks, or in their backwaters (the former kind is called *nöhön,* the latter *lhòm*), can be held in adat-ownership, or at any rate the fences enclosing such basins can be. Within the area affected by the right of avail (p. 95f.) everyone has the right to stake out such fishing basins, provided no other interests are harmed.

This right of adat-ownership can be held by individuals (residential plots are almost without exception the personal property of women). As everywhere else in the Outer Provinces [i.e. outside Java and Madura], no village or other jural community holds land in adat-ownership. (—).

The right of adat-ownership is initially vested through the occupation of virgin land (*rimba*) or — rarely — of *padang* (p. 62), which does not mean a completed reclamation, however, but the placing of visible tokens demarcating the area intended to be cultivated. This right can either devolve automatically to the adat-owner's heir, or be transferred during his lifetime (by the owner, but not by a tenant) through sale or gift. Transfer by way of barter or through prescription is unknown. The right expires when the land is explicitly abandoned or when it becomes extinct. Extinct here means, in the case of *ladang* (i.e. dry

fields which are cleared but not diked), that all traces of cultivation (often lasting only one to three years) have become invisible. But as regards *umòng* (i.e. wet fields ringed by low dikes, in Aceh Major seldom artificially irrigated but flooded by rainwater), as well as [*200*] gardens and residential plots, extinct means that people have lost all memory of such land having belonged to any particular person. A person may therefore still exercise his right to an *umòng* which no longer shows any visible trace of his former occupation of it. Similarly, former rice fields gradually turned too brackish by sea-water for further cultivation are still considered to be part of the village cultivation area.

Adat-ownership of wet fields, etc., is not lost when the owner lawfully moves elsewhere (p. 60); but should he stay too long, his rice fields may be appropriated by the chief (p. 91).

Extinction of adat-ownership through prescription alone is unknown.

As indicated earlier, sale and gift are not, as in our law, contracts *relating to* the transfer of ownership, but, similar to barter, methods of *actually transferring* ownership. Purchase (*blòë*) or sale (*publòë*) is transferring land in return for a money payment (*yum*), now or later. A gift (*hibat*) is transfer without payment. According to Acehnese adat law these transactions are therefore not 'contracts' (let alone mere consensual contracts) binding a person to transfer a thing. The conception of failure to 'convey' a contractually 'sold' object is unknown, because in Acehnese law there is no sale before the actual delivery of the property; default of payment, however, may easily occur. But since adat law knows no symbolic or other formal methods of transferring land or water from one owner to another, and giving a title therefore consists in permitting the latter to take full control of the property, some jurists had the illusion of having found a 'contract' which 'transfers dominium' after the manner of the French Code.

Since only Indonesians can hold a right of adat-ownership, transfer of this right to non-Indonesians is impossible (—).

Transfer of adat-ownership of land (and of water?) by sale or gift is lawful only if three essential requirements are observed. First (as the after-effect of a former right of avail?), the presence at the transaction of the village authorities and elders, who may prohibit alienation, but only for very important reasons (public opinion dislikes the sale of hereditary fields). Secondly, the presence also of about ten witnesses [*201*] (p. 73) from the village or villages of the parties, which witnesses are remunerated with tobacco leaves. Finally, offer and acceptance (*pösambōt* and *sambōt*) in accordance with the Islamic *ijab*

and *kabul* (p. 12), though no other Islamic influences on sale can be found.

Because of the existence of the right of first option (above, p. 98), no rice field, garden or residential plot may be sold unless the owners of the adjoining lands have been notified and have declared that they do not wish to exercise their right. In present-day adat law there is no trace of an outright sale of land or water which tacitly gives the seller the right to redeem the property for the same price within a term of years, or during the time it is held by the purchaser himself. Not unknown, however, is a sale with a stipulated right of re-purchase, that is, with the seller explicitly reserving the right to buy back the property. In cases of alienation of rice fields the chief expects to be consulted, though this is not always done (p. 65). He gets (used to get?) one per cent of the price of every rice field sold. Because of their situation, the alienation of dry fields (*ladang*, pp. 61, 63) is relatively rare. With gifts for the benefit of Islamic scripturists the prescriptions of the *hukōm* (religious law) are often observed (as to the correct form of offer and acceptance, origin of the property, etc.).

At the larger divisional capitals and coastal places, and often elsewhere as well, native land rights have often become confused, probably as the result of illegal transactions with Chinese and Europeans, or government interference. Special measures to regulate the now existing conditions might be helpful, particularly in the capital of Aceh itself, which we christened — *pars pro toto* — Kuta Raja, ('the Sultan's stronghold') after the royal precinct.

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[*202*] Temporary rights of user,* as are also found elsewhere in the archipelago — either for the purpose of a few months' incidental cultivation (Borneo, Padang highlands, western Java) or in village-owned land allotted as an apanage or as an attachment of office (Java) — are in Aceh known mainly in chiefdoms with much primeval forest, where

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* [Van Vollenhoven here writes *gebruiks- of genotrecht* (lit. right of use or right of enjoyment), presenting the terms as if they were synonyms. At a later stage of his writing they became two different conceptions. Where adat-ownership is vested in a group (household, family, etc.), as is common enough in Indonesian adat law, *gebruiksrecht* became the term for the (subordinate) right of the individual members or sub-groups over their respective allotments. *Genotrecht*, conceived as an essentially short-lived right, is what V.V. refers to here. In the present edition this term will be rendered as 'temporary tenancy' (and not as 'right of enjoyment' as in Ter Haar, 1948 — see note on page 43, *supra*). - *Ed.*]

they concern temporary cultivations of *ladang* land (p. 98); in the past they were also found on the riparian strips of *tanòh raja* (p. 97).

Besides the right of avail, adat-ownership and temporary tenancies, there is also a peculiar right by which the owner of a piece of land has a first option on adjacent land offered for sale. He is entitled to buy at the price tendered by a non-neighbour. (—) This right of first option inheres in, and thus follows the vicissitudes of, the first-mentioned property. Should a dispute arise between persons having such an option, the matter is decided by the court if the parties cannot reach a settlement among themselves.

For the sake of completeness the important right of occupancy * (p. 98) must be recalled. It is subject to the right of avail and the permission of owners of land in the immediate vicinity of the proposed reclamation. It is obviously also subject to the provisions relating to newcomers to an area, as described earlier (p. 60f.). As stated before, the exercise of this right [19] creates adat-ownership, except [in the past] in respect of the riparian strips of *tanòh raja.* Allied to the right of occupancy is the right to collect natural produce, to wash gold, to hunt, to convert small stretches of river into fishing basins (pp. 98, 105), etc.

The right of grazing on fields and *padang* land has also been mentioned already (pp. 96-7).

Yet another land right is the share-cropping tenancy (*mawaïh,* etc.) held by a person who has been granted a piece of cultivated land for him to work with his own plough, water buffalo, etc., a right for which he must pay one-half (or other stipulated proportion) of his crop to [*203*] the owner or the temporary holder of the field. If the field is subject to a ban (p. 75) the chief who imposed the ban will act as grantor of this right. The term *mawaïh* is used only when the crop is divided in halves. (—) The obligations of the parties appear to be fairly accurately defined. Unless otherwise agreed, the tenant is responsible for draught animals and seed, for the provision of [ritual] meals during planting and reaping, and for making over one-half of the harvest to the grantor. The latter must allow his tenant full use of the

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* [Van Vollenhoven here introduces *ontginningsrecht* as a technical term which gained general currency in Dutch adat law writings. Its literal translation is 'right of reclamation' (though in Ter Haar, 1948:83 it has been rendered as 'right of pre-emption'). None of these terms conveys the essential meaning of this right as V.V. conceived it: a means of vesting adat-ownership (or at least a preferential right) over hitherto unused and ownerless land. 'Occupancy' does convey this meaning in English usage (Osborn, 5th ed. 1964; Shorter O.E.D., citing Blackstone). - *Ed.*]

field, and, after he or his representative has witnessed the measuring of the harvest, remove his share from the field.

Any field may be subject to a share-cropping tenancy, and any Acehnese can be a share-cropper; but it is usually young bachelors without fields of their own who seek to obtain land from people with widely dispersed holdings, such as chiefs often have. All that is required to establish a share-cropper in his tenancy is actually to put the field at his disposal. Share-cropping tenancies seem to be neither inheritable nor transferable, and they expire after the reaping, normal duration apparently being just one season.

It is also possible to obtain a right to cultivate another's land (and water?) by renting it (*siwa*; to let, *pösiwa*) for money or husked rice. The letting of cultivable land is rare in the lowlands but common in the highlands (and in the dependencies?). Plantations, too, are let in the lowlands. Since the consequences of this right are not particularly far-reaching, it, too, can be established without formal requirements. No particulars regarding its inheritability or expiry are known.

A most important institution is tenancy in return for loan,* in which a person obtains tenure of a piece of land upon lending a sum of money (*pögala,* to give such tenancy; *gala,* to obtain it). He is entitled to use the land thus transferred as if it were his own (but he cannot, for instance, remove trees from a plantation), until such time as the property is 'redeemed' by repayment of the sum loaned. There seems to be no definite term for redemption. Granting such tenancy not concurrently with the receipt of a loan, but as a security for a previously incurred debt, or for money to be received later, seems to be

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* [Van Vollenhoven uses *grondverpanding, pand,* and *pandrecht* (lit. pledging or pawning of land, pledge or pawn, pledge- or pawn right) in connexion with this transaction. These terms became the accepted usage in Dutch adat law literature, despite the serious objections to which they are open (see Ter Haar, 1948:109f.). The transaction is widely known in Indonesian adat law as *gadai* (or similar terms), but has no parallel in either Dutch or English law. English terminology based on 'pledge' or 'pawn' is equally inappropriate for the purpose of interpreting *gadai,* because this conception does not imply the notion of 'security' for debt with its concomitant sanctions in western law. This leaves the present translator with two further choices: either to use the vernacular *gadai* (with local variants) and to define what it implies, as V.V. does in spite of his confusing Dutch technical usage; or to employ an English construction like 'tenancy in return for loan' which, though cumbersome, at least has the virtue of reflecting the essence of the *gadai* conception. Bearing in mind that the author delighted in coining new terms, I have made the second choice - *Ed.*]

[*204*] unknown [in Acehnese adat law].* The tenant does not acquire temporary adat-ownership but he seems to be entitled to transfer his tenancy to a third party by a similar transaction or to let it by the season or to grant it to a share-cropper. Questions of redemption, however, may easily become confounded in such cases.

In spite of the precautions which adat law has attached to the bringing about of tenancies in return for loan, if the owner's right to the holding is not specifically acknowledged from time to time it may after a period of many years be exceedingly difficult to determine who is the actual owner of the land, and this leads to invidious litigation.

The thing subject (*gala, gönala*) to this tenant-right may include wet and dry fields, residential plots, plantations and fruit trees (if owned separately from the land on which they stand), but not fish ponds or fishing basins. Every Acehnese is legally capable of holding a tenancy in return for loan, and the right is not restricted to members of the same village or chiefdom. The tenancy is vested when, on the occasion of receiving the loan, and after the land has been reaped, a holding is transferred to the tenant with the same formalities as have been described for the transfer of adat-ownership.

The tenant's right is inheritable but cannot, it seems, pass to a third party paying off the loan. The right is extinguished if the field ceases to exist [p. 98f.] or when the owner redeems it. Redemption (*töbōih,* p. 88) may likewise take place only after harvesting, when no crop is left on the land. The court decides whether there are grounds for making the owner compensate the tenant for part of the value of improvements when he redeems the property. Extinction of this tenancy either by way of the tenant assuming adat-ownership of the land because the loan has not been paid back after the expiry of a stipulated period, or by then becoming entitled to sell the property in order to reimburse himself, seems to be unknown in Acehnese adat law.

If we now examine the difference between this tenancy in return for loan and the right of a person purchasing a property on condition that the seller may buy it back (p. 100), we should obviously not, on the basis of the *Corpus Juris,* say that the owner-borrower of the first case

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* [This kind of transaction is not uncommon elsewhere (e.g. Bali, Java, Batakland). Initially termed *inlandsche hypotheek* ('adat-mortgage') by Van Vollenhoven, it is essentially different from a tenancy in return for loan, in that here the land (i.e. the profitable use of it) explicitly serves as security for debts, with the owner usually remaining in possession (sometimes as a share-cropper), at least for the time being. It was later termed *zekerheidstelling* ('security') instead of *inlandsche hypotheek* (see Ter Haar, 1948:122ff.) - *Ed.*]

[*205*] has a *jus in rem* and the owner-seller of the second case a *jus in personam* (p. 95), as even Wilken was tempted to do. The second transaction does, and the first does not, convey adat-ownership. However, it seems to be foreign to adat law to spell out the legal consequences of this difference; in practice the issue will probably hinge on the fact that re-purchase can be made subject to a time limit, which seems unknown for the redemption of land given in return for a loan.

A most peculiar right, ill-suited indeed to the indigenous law of Aceh, concerns *lands* which have been made *waköëh* (*wakap*) in terms of Moslem law. That is, having been 'consecrated' by the owners, such property is forever withdrawn from normal commerce and endowed for purposes approved by Moslem law, for example, for the benefit of a mosque. Any stretch of land or water may be so endowed, but as a rule it is rice fields [20] or plantations. The question of who should be regarded as having title to this property has been hotly debated by Moslem scripturists; it leaves the ordinary Acehnese unconcerned. A *waköëh* title is established by the actual setting apart of the land for the purpose mentioned. The right is not transferable, and it expires only if the property ceases to exist. Such consecration of lands, obviously undesirable from the point of view of economic and legal mobility, is very rare in Aceh; this conception of *waköëh* has nothing in common with other, hybrid meanings of the same word (pp. 61, 70, 97).

After this summary of Acehnese rights relating to land it may be useful to note which land rights do *not* appear in it. First, full ownership or *dominium*; then, a right of possession in the sense of *possessio civilis* (—); further, perpetual servitudes, *superficies,* hereditary leasehold [*emphyteusis*], tithes, usufruct, *usus*; and finally, the loan of land.

The right of avail and the right of adat-ownership over water have been discussed above (—). Besides these, two more rights over water must be mentioned.

In the first place, there is the right of irrigation, that is, the right to use a natural stream of water for irrigation, or to build an irrigation system and to use this artificial supply for irrigation purposes. This right may be somewhat different for rice or for other crops; it differs again in respect of natural and artificial supplies of water; and it may [*206*] be extended to different kinds of adjoining landholders. There is no doubt about the existence of this right in Aceh, but further par-

ticulars are lacking. Most of the wet rice fields (*sawah*) in Aceh Major are watered by rain.

Secondly, there is the right of fishing, analogous to the rights to hunt and to collect forest produce mentioned above. It is the right to catch fish with basket traps, rods, casting nets, drag nets, etc., or by means of screen traps (*jang*). In the shallow marine zone around Aceh everyone seems to be free to fish in any such manner. With regard to natural waters (as in the numerous little streams of the Kaway XII) the right to fish appears to be limited only by the right of avail. In fishing basins set up along rivers or creeks, only a hook and line may be used. No fishing is allowed in another person's fish pond. During the agricultural season only angling is allowed in another's flooded rice field, but out of season any gear is permitted. After a good catch at sea, or even a moderate one, fishermen are obliged to make a gift of fish to spectators from the coastal villages who await their arrival, and they must pay the chief and influential headmen a tribute in fish on pain of having their boats and gear 'banned' (p. 75). The significance of the demarcated stretches (*lhōk*) of beach along the north, east and west coast and in Aceh Major itself, is not that in the waters opposite these divisions only the boats that belong there are allowed to fish; they indicate the areas of the respective fishermen's guilds responsible for the annual sea *kanduri* [ceremonial meal].

We may now ask whether the Acehnese rights over land and water listed above should be regarded as an exhaustive and immutable inventory. The Acehnese themselves probably never seriously considered this question. If there were reasons in abnormal times for modifying a right, so it was modified. In the vicinity of our concentrated front line around Kutaraja (1885-1896) during the Aceh War, share-cropping on badly damaged land was practised on the basis that the share-cropper was entitled to the entire crop during the first three years, and to four-fifths of it in the fourth year. Is it not likely, therefore, that under compelling new circumstances other significant changes, or new rights, would emerge?

[*207*] That some of the rights we have discussed are so similar in appearance as to be almost identical — for example, adat-ownership subject to the right to buy back, as against tenancy in return for loan; short-lived adat-ownership of *ladang* fields beside temporary rights of user (p. 100*n*) — is only to be expected from the natural growth of these institutions. Such confusing similarities exist also in other law areas (—).

Law of Chattels *

The legal matters which Acehnese distinguish as *utang pö'utang* from questions of land and water could be defined with some accuracy as an equivalent of our law of movable property. In Aceh that includes: dwellings (which can be taken down and removed almost as easily as our market stands), boats, livestock, furniture, kitchenware, clothing, weapons, ornaments, foodstuffs and, especially, money. This law of chattels has many parallels with land law, but also many differences.

A right of avail over property other than land and water is unknown, and there is no right of occupancy [as a precursor to vesting adat-ownership], right of first option, or right of use (see pp. 100-1) in respect of movables.

Adat-ownership (*milék*) of movables is, of course, very common. It means the power to act as owner of the property, but unlike adat-ownership of land or water it is not subject to restrictions. The right is held by individual persons; a 'village ownership' [21] of movable property (—) is of little consequence. Adat-ownership of movables is originally acquired by appropriation, in cases where this is still possible (forest produce, game, fish). It expires when the property ceases to exist, or when it is abandoned; but not through prescription. The right is transferred either automatically by inheritance, or intentionally by sale, barter or gift. Gifts of movables, (and of other property — see above) are often made in accordance with the rules of Islam; contributions to ritual meals *(kanduri)* are of course governed entirely by indigenous local custom.

Barter (*tuka*) is the transfer of one thing against the simultaneous or [*208*] subsequent transfer of another thing.

Usually no formalities are prescribed for the transfer by sale of movables. Only when cattle are involved is the use of special formulae required, as well as the co-operation of village authorities and witnesses. Note here the association of livestock (especially draught

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* [Van Vollenhoven's heading of this section is *Schuldenrecht* (lit. law of debts, law of obligations), and both term and classification became standard usage in Dutch adat law studies (though not in other fields of Dutch jurisprudence). 'Law of Chattels' appears to be the appropriate rendering in English, provided the meaning of 'chattels' is confined to its most common usage in English law, i.e. chattels personal, not chattels real. This term not only brings out the indigenous distinction stressed earlier (p. 95) by V.V. between rights in land (and water) and rights in 'movables', but also subsumes 'debts' (i.e. choses in action as chattels personal), as does the term *schuldenrecht*. - *Ed.*]

animals) and land, the primary means of existence in an agrarian society — the *res mancipii* of the ancient Romans.

The buyer of a house merely takes it down and carries it away; but the buyer of a water buffalo must, before using the animal, first pour water over it from an old-fashioned coconut ladle — a clear illustration of the difference between adat *law* and adat (pp. 5-6).

Apart from the right to appropriate the natural produce of land and water (above), there is no provision in adat law for acquiring property in other ownerless things. All such rules for filling out the system are left to the court.

As an analogy of share-cropping there is profit-sharing in chattels (for a half-share, *mödua laba,* or other proportion), for example the herding and maintenance of another's livestock for one-half of the number of offspring; [22] or the cutting and grinding of another's sugar cane (with one's own mill, water buffalo and helper) in return for one-half of the resulting product. (—) The claim to such shares is established without any formality, and is presumably not inheritable; it expires when the property perishes, or when the venture is completed.

It is less uncommon to find *waköëh* chattels like Korans and other religious books (*kitab*), prayer mats, and ceremonial utensils for prayer houses and Moslem schools in Aceh than similarly consecrated lands.

Hiring (*siwa*) of cattle is known, usually against payment of unhusked rice, as well as the renting of shops, stalls (*ködè*) and sugar mills. The letting of dwellings, on the other hand, is contrary to local custom. Letting and hiring take place without formalities and become [*209*] binding as soon as the animal, shop, etc., is placed at the disposal of the other party.

Also chattels may be held in return for loan [analogous to tenancies in return for loan — see p. 102f.]. A typically Acehnese feature is that, if no interest is stipulated, the property so given must be double the value of the amount borrowed. When interest has been stipulated, the property must be equivalent to the principal sum plus the interest for the term of the loan. Furthermore, the money lender may use the property — a right of user as distinct from a security pledge — and this includes the right to hire it out. The transaction, which is concluded without formalities, may involve boats, trading stands, personal jewelry, weapons, and fishing nets; but never houses, draught animals or other livestock. Redemption has no time limit. Should property

which represented double the value of the loan be lost, the owner is paid the equivalent of the principal (instead of having to refund it) — this rule is probably not confined to cases where the holder was responsible for the loss of the property.

Besides all these parallels with rights over land and water, there are also a number of rights which, though not exactly parallels, are yet closely related to the system of land rights. In order to understand these, the jurist should first put aside the Roman (and present-day western) division between rights in things and rights against persons, between *actiones in rem* and *actiones in personam,* and remember how much effort it cost him in his young days to think in these terms. Acehnese are not interested in learned distinctions. We saw this already when we discussed sale and share-cropping. With the sale (i.e. here: actual transfer) of land the purchaser acquires a right in the land, and the seller a right to the purchase price for which he may sue the buyer. With the sale of movables, one party acquires a right to the goods concerned, the other a right to the purchase price. The first case deals partly with land law and partly with obligation; the second case lies entirely within the law of chattels. The share-cropper acquires a (temporary) right in the land he cultivates (a right which, as land right, has its appropriate place in land law alongside adat-ownership, tenancy in return for loan, etc.), but the landlord has a claim to one-half of the crop, and thus a right which falls under the law of chattels. The Acehnese classification therefore aims at what is obvious to everyone: the object of the claim, the *petitum;* and it would be useless [*210*] here to distinguish a real action from a personal action when the Acehnese has not even thought of applying the terms for offer and acceptance, *ijab* and *kabul* (known to him from the Islamic law of marriage) to what we might call contracts in adat law. For this reason, neither the Moslem law of contract nor the rules of the third book of our Civil Code correspond to adat law, or would be helpful in shaping it. That could be done only by legislation based on indigenous legal categories.

Rights to money and other chattels may in Aceh be established also on quite different grounds. In the first place, through the lending of money (*pönguy pèng*), whether or not in return for land or chattels. The date of repayment may or may not be stipulated. Loans often carry interest, but not always (where land has been given in return, presumably no interest is ever due). Where interest has been stipulated, chattels given in return for the loan need not be double its value but

equal only to the principal plus interest. To lend money for interest is strongly disapproved of on religious grounds, but loans on the condition that the creditor would receive *mödua basi* — i.e. one-half of the profit gained by exchanging Aceh-dollars [for Dutch currency] at Pinang — were considered less sinful, and were commonly practised as a disguised way of obtaining ordinary interest even where no currency exchange took place. Anyone, Acehnese or not, may enter into a money loan; vesting and expiry of rights are governed by the nature of the transaction.

Closely related to money loans is the advance (*pangkay*) on crops mentioned earlier (e.g. on pepper crops, pp. 64-5), or on the collection of forest produce. This advance, with usurious interest, must be repaid by the debtor after the harvest. Should he be unable, or only partly able, to do so the amount outstanding, with a fresh addition of usurious interest, remains a charge on subsequent crops or collections. In the event of crop failure the creditor loses his claim, or part of it, and therefore bears the risk in this transaction.

Long prohibited, but not therefore extinct, is the so-called *lada bunga* contract (? *bungòng lada* = pepper blossom), that is, a loan advanced on a pepper crop and repayable in pepper on terms enabling the money lender to get the product far below its market value. For [*211*] obvious reasons also Indians and Chinese are approached for such advances. Vesting and expiry of rights are governed by the nature of the transaction itself. Seizure or sale of the plantation upon default of payment appears to be impossible.

All rights of user of perishable and imperishable goods other than money are known by the same term (*nguy*, to borrow; *pönguy* or *bri nguy*, to lend); also safekeeping (*trōh, tömörōh*) is known. These contracts involve no obligations other than those understood by every layman; doubtful cases are decided in court.

Gambling and betting are common in adat law, though prohibited by Islam and (with certain exemptions) also by our administration. Claims arising from such transactions are not enforceable in government courts (ISb. 306/1907), but this means little in Aceh. Betting by spectators at animal fights is or was a daily occurrence (—). The rules for those who enter animals for a contest are singular. When animal A is to fight animal B they are first shown to witnesses by their respective owners, who then put down equal stakes, the combined amount (*tarōh bak*) being handed to the chief or village headman. Now the animals fight, and if A wins, the chief or headman will pay its owner the

combined stakes — after subtracting, of course, something for his trouble.

Service contracts for wages (*upah*) are known here, but in view of the co-operation of wives, children, adult sons and other relatives, and of other voluntary assistance with the cultivation of fields, the social importance of wage labour is less than it is in modern countries. Examples of paid services for shorter or longer periods are: planting out by women of rice seedlings outside the lowlands of Aceh Major; suckling of infants; acting as go-between (*sölangkè*) in marriage negotiations (which involves a variety of minor duties); cutting wood for a wedding; circumcizing; participating in ritual death-watches; various functions of the village Moslem officiant. Payments are usually made wholly or partly in kind, such as lengths of cotton, a quantity of mixed [*212*] husked and unhusked rice, etc. What we call piecework contracts — i.e. to do a certain job for an agreed price — are not distinguished from wage labour in Acehnese law, and are concluded (in the past more often than nowadays) with, for instance, carpenters, blacksmiths and goldsmiths.

Among maritime people like the Acehnese one finds, of course, some kind of shipping enterprise. The master (*pawang*) of the ship is usually himself the owner of gear and boat (fishing craft or other vessel). The crew (*awak*) are in his paid employment. There is no special information on cargo trade, although there is or was considerable cargo traffic by sea from Aceh Major to places on the west coast which are difficult to reach overland.

Contracts of agency are certainly not unknown, and the agents are called *waki,* from the Arabic *wakīl* (cf. pp. 63, 64, 71). The function of the *waki* in concluding a marriage has a unique, Islamic character.

A peculiar variety of agency operates between the master of a fishing boat and the fishmonger (*mugè*). The master hands his catch over to the monger for a fixed but unpaid price, and the monger takes the fish to the market. If the fish realizes more, the monger may keep the difference (often he manages to wangle even more from the master); if the fish realizes less, the monger bears the loss, unless he is able to soften the master's heart. The master will usually renew the contract with his regular monger, but either party may cancel the arrangement after each completed assignment. On the same basis the larger fish dealers may engage smaller dealers. The regular agents are obliged to contribute to the annual ritual sea *kanduri* of their principals (p. 105).

There is a similarity between this contract and the legal relationship

of a plantation headman with the chief's pepper buyer (pp. 64-5), but in the latter case the price is not always stipulated beforehand. A profit fixed by the officials concerned with the pepper trade (e.g. how much the chief may appropriate for his trouble) is called *kamsèn*, from the English 'commission'.

Personal surety, based on consent (*angkèë*, to stand surety for someone), appears to be frequent in connexion with loans of money. Adat law does not, however, recognize the liability of a co-surety for the entire sum, but prescribes that liability be shared among co-sureties.

[*213*] The cash guarantee or *hak gancéng*, which our administration often demands from the chiefs, is an arbitrary imitation of the litigation pledges of indigenous judicial processes, but has nothing to do with adat law.

Corporate societies or *carikat* (pp. 59, 87) appear to be hardly developed here.

Apart from rights arising from money loans, wage service, etc., which remind us of claims arising from contract in our own law, there are still other rights and duties which cannot, however, be forced into our legal system of contracts and obligations without being distorted. It would be even difficult at times to say whether these are indeed customs with legal consequences, that is, adat law (p. 7), or only matters of popular usage.

The reciprocal giving of aid, which is so important elsewhere in the archipelago, is of far less significance in Aceh, although it is not unknown when the rice has to be harvested or threshed. To join efforts for a useful purpose does not (or did not) seem to come naturally to the Acehnese. Those who help to pound rice often receive only a tot of fermented rice-drink; and there is voluntary aid (*mösöraya*) in large numbers on the fields of wealthy folk who pay for this service with a generous meal.

The presents (*tömöntuëk*) given to the bride by guests at her wedding feast, or to the bridegroom by his close blood relatives, must be reciprocated if the givers are younger kinsmen of the bride or groom: when leaving the festivities they are given a sum of money about double the value of their presents. Elsewhere, too, the marriage customs include such compulsory gifts. Comparable to these are the compulsory gifts by returning fishermen, and the compulsory contribution by fishmongers to the annual ceremonial meals of the fishing masters who are their regular customers.

The village buying of meat during the period of the fast seems to have an entirely domestic character, with the village officials dividing the meat and apportioning the cost amongst the villagers; and the same can be said of the collective contributions for the festive end of the fast or of the Koran-instruction course. Such voluntary contributions are called *ripè*.

Also in this connexion the question arises which we asked before (p. 105), of whether these obligations are so immutable as to prevent [*214*] the creation of other rights and duties. And again the answer may well be this: Acehnese certainly do not imagine that they can, through consensus between parties, create any new sort of obligation they fancy — remember here that most of the obligations described above spring not from abstract agreement but from concrete facts and performance; yet there can be no doubt that, given compelling new circumstances in legal commerce, they will create new rights and duties by adapting their existing institutions. Even if legal claims appear in our eyes to be closely akin — e.g. a fishmonger's claim and that of a seller on commission — this rather pleads for than against the credibility of the information. For where in the natural growth of institutions do we find rigid distinctions?

As could be expected from an illiterate people without a class of professional lawyers, there has been no systematic refinement of the law of chattels — notwithstanding the Acehnese fondness for money. Legal rules therefore exist only with regard to the essentials of frequently recurring issues; the rest is left to the court to decide on the merits of each case. (—) So in cases involving what we would call unjust enrichment, an indigenous court would find accordingly, although the issue is nowhere specifically covered by adat law. Formal requirements for the creation or transfer of rights to chattels are, as said before, observed only when these rights are considered to be as important as rights over land or water, that is, with the transfer of plough-cattle. Prescription is as unknown in respect of chattels as it is in connexion with land rights.

It may probably be assumed that Acehnese land law, as well as the law of chattels and the law of inheritance, deal only with corporeal things, and that incorporeal things or titles are not recognized as discrete subjects of proprietary rights; but the devolution of the right to a tenancy in return for loan upon the tenant's heirs, would not be in accord with this assumption.

Law of Wrongs *

[*215*] The division between actions which are civil wrongs only and actions which are criminally punishable as well as civilly actionable, is unknown in Acehnese adat law. To the Acehnese, any impermissible conduct can lead both to restitution or compensation and to punishment. If it is true that litigation payments are made in actions for debts, but not in cases involving punishment (p. 72f.), then it would appear that the Acehnese do sense a difference between the two kinds of wrongdoing; if not, it might perhaps be better to regard their law of wrongs simply as part of their law of chattels.

Are these wrongs exhaustively tabulated in Acehnese adat law? It is evident that they are not, no more than we would be able to enumerate all actionable wrongs under our civil law. Such wrongs comprise all conduct violating rights which others derive from the constitutional law, marriage law, inheritance, land law, or the law of chattels, and such conduct may be punishable if the circumstances warrant punishment (e.g. if the transgression is considered to be serious, or perpetrated with malice). A fairly heavy fine is (was) therefore exacted for a breach of betrothal without reasonable cause by the bride's father, in which case the betrothal gift (p. 86-7) must be returned as well. For the same reason incest — i.e. sexual intercourse with one of the closely related women referred to on page 82 — is a serious punishable wrong. It is likewise a punishable adat-wrong (involving a heavy fine) to be in any way connected with the conclusion of a marriage without authority under adat law (i.e. without being the Moslem officiant — *töngku mönasah* — of the bride's village, or the *kali*), regardless of whether the unlawful functionary had secured a mandate (or supervisory power) from the woman's natural guardian (*wali*), or had been appointed deputy *wali*.

Further, it is a wrong to allow one's cattle to roam about so as to cause damage to crops or plantations. Another wrong used to be the failure of a village headman to arrange in good time for the annual communal meal in the village hall to celebrate the birth of the Prophet. It is (was) also punishable without the chief's authority to use a rice field or boat banned by him (p. 75).

But besides these, there are numerous wrongs which on account of their seriousness or frequency fall into a separate category: such as homicide, bodily injury, maltreatment, theft and robbery, immorality,

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* [*Deliktenrecht* in the original text. - *Ed.*]

insult; as well as all conduct adversely affecting the honour or prestige [*216*] of chiefs and headmen, and (in the past) of their relatives and friends.

Some special wrongs may be noted briefly. It is (was) a wrong to plant grave stones in the closed season, that is, as soon as the seed beds are sprouting, because this would constitute a danger to the community by threatening the entire rice crop in the neighbourhood. Sexual intercourse between a man and a woman who are neither husband and wife, nor, in the past, master and slave, is a very frequent wrong (fornication: *dina, mukah*), but rarely punished. In practice, illicit intercourse (*mumukah*) by married people (especially women) is considered more serious than between unmarried couples. Abduction is another wrong; but abortion in or out of wedlock (a common occurrence) is not.

Punishable was also the unauthorized use of the privileged attire of the nobility: formerly yellow for royalty; distinctively patterned headcloths and weapons for particular chiefs.

Lawful private redress (p. 77f.) obviously never constituted a wrong, but as adat law prescribes death for both parties in cases of fornication, the person who caught both in the act would run the risk of vengeance if he killed only one and failed to take the other to court.

Some chiefs took or take vigorous action against certain wrongs under Islamic law, such as smoking opium. In common with other indigenous folk, the Acehnese pay far more attention to the accomplished deed than to the criminal intent of the offender. Punishment of an unsuccessful attempt therefore seems to be unknown; the objections which we might raise against this are in a sense balanced by the fact that some acts of conduct which we would regard as preparatory or punishable attempts are here actually wrongs — for instance, sneaking through a village at night-time.

It is significant and worth mentioning that acts considered wrongful when committed against Acehnese are under adat law usually not so regarded if they are committed by Acehnese against the person or property of foreigners. If perpetrated against fellow Moslems (let alone a *sayyid*), such actions would still be recognized as wrongs; but if they concerned infidels they were usually not considered worth punishing. At the time of our notorious military concentration [1885-96] it [*217*] happened that local Acehnese believed to be 'in league with the infidels' were treated as infidels. This construction of the field of

wrongs is well illustrated by the acts of piracy against non-Acehnese for which this nation used to be notorious.

Wrongdoers are usually common villagers, but minor headmen, too, could (can) be brought to trial for actionable wrongs. Royalty and chiefs used to be more or less above the law; nowadays their wrongs are put before government courts, or the *musapat* courts which we invented.

Jural communities (villages or chiefdom) can likewise be held liable, and if necessary even be punished, for wrongs committed within the area under their right of avail if the culprits have remained uncaught. Whether this vicarious liability of a jural community (—) is still based on current Acehnese adat law is open to doubt. For many years, however, it was accepted and enforced by our military government, when a village or chiefdom was fined for the destruction of telephone wires or other property, or for failing to take timely measures against gangs disturbing the peace. (—) There is no question, however, of a genuine 'collective' liability of fellow villagers for each other's misdeeds, nor was this implicit in such 'political fines',[23] because these were usually imposed upon the village which failed to prevent the crime from taking place within its domain, and only rarely upon the village of the unpunished (and usually unknown) offenders. The only rudiment of such a communal responsibility is that vengeance (*bila*) is directed against [*218*] the whole lineage (*kawōm*) of the culprit, or, possibly, even against affinal relatives. If blood-money is accepted instead, all lineage members are obliged to make a contribution (*ripè*) towards it, a period of one to two years sometimes being granted for the amount to be collected.

The Acehnese law of wrongs is still in a state of transition between a systematic law of revenge and a penal law system. The evidence for this is twofold.

First, public prosecution was an exception, and usually prompted by the chief's greed rather than by his sense of duty, for he would willingly allow the prosecution to be bought off if the evidence of the wrong (e.g. in cases of fornication) could be covered up. In the district of XXII Mukim thefts were so common that buying off their prosecution became itself an adat institution (*töbōïh*). As a rule a wrong (i.e. what we would call either a tort or a crime) is prosecuted upon the complaint, or at the instance, of the injured party, that is, the aggrieved person himself, or a near-relative (husband, father, brother, etc.) of a seduced woman, or of any person whom the court may consider to be

the injured party in a given case. Offences against the public order, and therefore prosecuted even without a private complaint having been lodged, apparently involved only trespasses which, in the opinion of the chiefs, affected their honour or that of their relatives or friends. These included such common Acehnese sins as fornication, if their commission particularly desecrated a certain place or time, or revealed a shocking lack of decency, or if they were committed by victims of the chief's displeasure. In this respect there were no recognized adat rules.

Secondly, the characteristics of the old law of revenge were betrayed in the manner in which satisfaction was sought in cases of physical insult (e.g. a slap in the face), bodily injury, and homicide, because as a rule these were not submitted to the chief's justice, but resolved in feuds between members of the respective lineages without intervention by the lord of the country.

Besides compensation etc., and vengeance, the customary Acehnese penalties in the field of wrongs were: death, outlawry, serfdom, blood-money, fines, and thrashing. Imprisonment — close to, or underneath the house of the chief — was not an adat punishment, except sometimes for a few days in cases of petty theft; but it was known as a [*219*] means of exerting pressure. Apart from these adat punishments there were, especially for impecunious people, all sorts of punishments a cruel judge might invent: flogging, exposure to public ridicule, cutting off hands, and many others. Stoning of fornicators and other punishments under Islamic law were sometimes ordered by chiefs eager to establish a particularly pious reputation, or in places where a scripturist enjoyed great authority. Occasionally specific punishments were prescribed for specific wrongs, such as the death penalty for theft (even where the offender had not been caught red-handed). In cases of adultery both parties faced either death upon being caught in the act, or throttling and drowning at the instance of the court. Smuggled goods were confiscated. Usually, however, the choice of punitive sanction was at the court's discretion.

Blood-money (*diët,* an Arabic loan-word) existed only or mainly as a means of ending a mutual feud which otherwise threatened to become interminable. Under adat law it had a fixed rate: for instance, for slaying a man it was normally five-hundred Spanish dollars (Aceh dollars), but if the case ultimately did come before the chief, he would often have his *kali* calculate the *diët* according to Islamic law (p. 76). One may ask what happened if both parties belonged to the same

lineage, and whether nowadays, with or without the help of a native administration of justice organised by us, redress by vengeance or the payment of blood-money is still being recognized in Acehnese law. The mere fact that there is no current indigenous term for blood-money does not yet mean that the avoidance or termination of feuds through the payment of blood-money was the result of Islamic influence, because even adat-ownership is known only by the Arabic loan-word *milék*.

Several wrongs involve(d) the obligation to tender apologies as well, either to avoid litigation, or as an essential complement to paying a penalty or compensation. Thus a formal request for pardon, couched in the correct adat formula, is required in cases where dignitaries have been insulted by commoners; insult between equals requires a 'cooling off' gesture with only a casual word of apology; and if a superior has insulted a subordinate, a 'cooling off' gesture is deemed sufficient. The ritual cleansing of a crime-tainted village by means of a meal of atonement, or in some other fashion, seems to be unknown.

[*220*] The most important sanctions were, however, compensation to the injured party, and a fine or *salah* (also meaning proof of guilt) which used to go to the judge-chief. In the past, people unwilling to pay a fine were sometimes imprisoned in the space beneath the chief's house — often in shackles if the fine was a heavy one — until the fine was paid by them, or by someone on their behalf (p. 115f.). Capital offenders (e.g. fornicators) unable to buy off their trial (*uröëng salah*) were sometimes made the unpaid servants of the chief, instead of being throttled and drowned; this measure was occasionally also applied to those unable to pay their fines.

There are, of course, no general rules governing the lapse of sanctions. The right of vengeance ceased (ceases) upon the death of the culprit in a blood feud. Claims for compensation or other legal sanctions presumably lapse only when the court considers this to be fair under the circumstances. In the old days the penalty or vengeance was suspended if the guilty party fled to the royal precincts and remained there as the sultan's serf.

Although our regulations with regard to the indigenous administration of justice give the impression that the principles of adat penal law are still applicable, and that only the penalties have been replaced by those of the Native Criminal Code, actually nearly all adat penal law seems to have been replaced by our law (at least in the government *musapat* courts). Nevertheless, one important feature has remained: the

aggrieved party appears before the *musapat* without having to make a distinction between civil and criminal law, and it is for the court to decide whether the wrongdoer has to compensate the other party, or is to be penalized, or both.

Legal Remedies

The first sanction to be found in all this adat law is the fear of being 'shamed' or otherwise inhibited by the public opinion of fellow villagers; then, amicable settlement of disputes by the village authorities, or formal administration of justice (backed, if necessary, by execution of the judgment); and finally, private redress, either lawful or unlawful. Owing to the absence of collective liability of fellow villagers or of members of other territorial units, there is no sanction of expelling an adat offender from his village or chiefdom; but even expulsion from a *kawōm* [lineage] does not occur.

The relation between adat concepts and religious beliefs is revealed [*221*] when there is the fear of being afflicted with the vengeance of Allah or of evil spirits upon breaches of certain rules; for example, failure to keep a vow, or marriage of a commoner to the daughter of a *sayyid* (p. 82), or breach of the principle of avoidance between son-in-law and parents-in-law (p. 83), or committing perjury at some sacred place; or planting grave stones during a prohibited time (p. 114). If a breach (without precautionary measures) of these so-called *pantang* rules threatens the well-being of others as well, it is treated as a punishable wrong. The 'banning' of fields by the chief (pp. 75, 113) must originally have been a form of invoking a state of *pantang*. The fear of 'being cursed' (*kònòng srapa*) with disease by a parent or master seems to be less effective for the observance of the adat law here than it is elsewhere.

No one will have believed for a moment that, before our administration, indigenous Acehnese governments maintained public order by a regular system of police supervision backed by courts of law and powers of coercion. While public opinion and village authorities were vigilant, the chiefs were highly erratic. They usually prosecuted only persons who blatantly committed breaches of the social order (p. 115f.) without being brought to book in their own village or receiving their due through some form of private redress. The improvements which our administration may bring about will only deserve the interest and approbation of the people if courts keep in mind that an adat law like that of Aceh knows no precise form of action for the enforcement of

any particular right, let alone the difference between civil and criminal proceedings (—). The adat process knows only requests for 'legal redress' on the basis of submitted facts, independently checked and investigated by the court itself. The court's task will be to weigh all interests involved in accordance with the broad rules of adat law (if these are too wide, additional legislation may be required), and to see to it that all actual injustice be redressed as adequately as possible, and that further injustice be prevented as much as possible. Of primary importance are therefore the case itself and the appropriate judgment; [222] classification in the framework of adat rules comes second. If in the eyes of many people a judge bound by statute law still resembles a pharmacist who must strictly obey the doctor's prescription, then the adat judge may be likened to the doctor himself who, within the accepted rules of his profession, must advise and help. The latitude a judge is allowed in adat law was revealed, for instance, when the judge-chief ordered the seducer of a girl to marry her, or compelled illicit lovers arraigned before him to marry each other (pp. 83, 116). It is evident also in disputes about the often undefined boundaries of the highland chiefdoms, when courts (not the administration) are expected to find a solution as good men acting in all fairness.

Only those whose knowledge of law and justice is confined to western European systems (in which only practising lawyers find satisfaction) will fail to see how rational such a flexible administration of justice is for a simple society — and no less rational, in a different form, perhaps, for a more complex one.

Development of this Adat Law

What then is the value of this adat law: is it suitable, is it complete, is it capable of development? Nobody, surely, wants to turn this living Indonesia into a museum of lifeless adat exhibits, a curiosity shop of indigenous law.

There is reason to believe that, before our often rough and ready intervention, the legal institutions of the Acehnese, though still of a primitive nature, presented a 'certain completeness', something 'natural, truly indigenous, entirely suited to the stage of civilization in which (they) used to live' (Snouck Hurgronje). We can only understand these institutions, however, if we view them in the context in which they are conceived by the Acehnese themselves. But if we start looking for Acehnese actions in tort, for the Acehnese law of contract, or for Acehnese real actions, we are likely to arrive at the baffling conclusion that

all these vitally important matters are 'not provided for' under adat law. On the other hand, what used to be suitable at the time of the sultanate is not suitable now, and we have to be prepared for a development of adat law in major and minor issues. A wisely directed administration of justice may be invaluable in this respect; but it will, for the time being at least, be indispensable for the legislator to play a helpful part. In a well balanced Indonesian society we may expect a gradual [*223*] and characteristic development of its indigenous law (p. 24), but after the disturbance and major reorganization of Acehnese life, especially since 1896 and 1898, this process must of necessity be set going again with our assistance, and if the present reading of section 75 of the *Regeringsreglement* makes no provision for this, its scope should be widened.

The civil administration has already been established (—), and the autonomy of the chiefdoms of Aceh Major restored. [It would be useful to provide for the possible amalgamation of villages, and for a simple form of Indonesian voluntary corporation. The chiefs' administration of justice deserves closer attention, and the *musapat* courts should not be burdened with the procedural rules of the government courts. One might consider rules for the prescription, where reasonable, of claims older than twenty years, and suitable regulations for the execution of judgments, the payment of debts, and perhaps for the care of orphans. Further: a marriage ordinance similar to that of 1895 for Java; a more precise regulation of land rights, especially tenancy in return for loan; the cautious introduction of credit facilities without usurious interest, to be provided by banks or the government; and the recognition, where desired, of adat wrongs.] *

It will be necessary to have such reforms designed as far as possible by, or at least in consultation with, the Acehnese leaders of the population (in order to avoid such still-born innovations as 'agrarian freehold' and many others), and this should be done only after a painstaking investigation of existing conditions. Some of these changes need provide [*224*] no more than stepping stones towards new adat law, and could be dispensed with after a transition period of a few years — as is the avowed purpose of many adat regulations drawn up by Protestant Missions.

In this task there are four aspects which merit our particular attention.

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* [The bracketed section is an abbreviated version of Van Vollenhoven's suggestions. - *Ed.*]

First, the reintroduction or renovation of practicable indigenous means of evidence, such as any indigenous token signifying the transfer of land; or the introduction of the custom (known elsewhere) obliging the tenant in return for loan to recognize and 'remember' the owner's right by means of a small annual gift (e.g. a little basket or parcel of husked rice).

Secondly, the correlation of the adat private law and the Criminal Code for Natives (which in practice also serves as a guide for the indigenous administration of justice in Aceh). This Code unfortunately time and again leads to questions such as who can claim adat-ownership ('dominium') of the unreaped crop cultivated under a share-cropping arrangement. The Acehnese do not concern themselves with such questions; they know only that both parties were jointly entitled to this crop. Care should therefore be taken with the phrasing of penal provisions, so as to allow for an interpretation consonant to the nature of adat private law, and one should refrain from such things as a premature inventory of contracts.

Further, it would be no luxury to lay down in a lucid and simple ordinance a few rules like the following: that a court should not assume adat law to be silent in cases in which, within wide limits, it leaves the decision to the discretion of the court; that, instead of thinking in terms of actions *in rem* or *in personam,* the court should summon all parties involved (e.g. all three in the case of a cow sold by an agister to a third party), so that each may ultimately be given his due; and that the court must not construe actionable wrongs in terms of western conceptions. There is no objection whatever to adat law being regulated and refined by courts or legislation, provided that this is done in the indigenous spirit and without obstructing its further development.

And, finally, the aim should be to make this adat law, which of [225] course originally applied only to Acehnese (and their slaves), applicable to all Indonesians within this law area. As regards money loans, etc., it should be applicable even in transactions between Acehnese and other Indonesians. This suggestion is justified because Indonesians moving elsewhere will at any rate often lose touch with the institutions and customs of their places of origin; it is practical, because it avoids needless diversity of laws; and it is in line with the preparatory work done for the Minahasa [northern Celebes] in 1901 (see Carpentier Alting, 1902, I).

Even now, adat law is not exclusively concerned with Acehnese, for

in Sungòë Raya on the east coast the chiefs (*ulèëbalang*) are born of a *sayyid* family (i.e. they are Arab), and the law of marriage extends to all Moslems alike, including for instance the marriage of an Acehnese girl with a *sayyid* or other Arab, or with a native from Java, Kerinci, or elsewhere. Nevertheless, as regards estates left by foreigners, or wrongs against their person, the adat rules of justice amounted to little more than lawlessness (pp. 95, 115f.).

Finally, it may be asked to what extent 'proven social needs demand' the complete or partial replacement of Acehnese adat law (private law, criminal law, law of procedure) by the entirely unadapted 'provisions applicable to Europeans'.[24] The unanimous opinion will probably be that such compelling needs have not been proved at all. The introduction of the first few chapters of our law of property (ownership, civil possession, etc.) would do serious harm, and so would our system of almost exclusively consensual contracts, of which the people have no idea, and which even the *Corpus Juris* failed to achieve. Even the rule, so obvious to us, that a wife must follow her husband wherever he sees fit to take up residence, would here amount to a wrong (p. 85).

A good criminal code for Aceh would have to contain far fewer sections than its European counterpart, and its crimes should be less specifically categorized and more broadly formulated. It would have to make practical and comprehensible provision for the interests of the aggrieved party, and link up with adat private law. No one wants a western form of judicial process. What these people therefore need is not a premature application of European law and procedure, but a thorough investigation of all their adat law, followed by a gradual process in which some parts are developed and supplemented, and others eliminated.

The destruction of adat law will not pave the way for our codified law, but for social chaos and Islam.

CHAPTER VI

THE MINANGKABAU LAW AREA

[December, 1911]

Delimitation of the Law Area

[*247*] The Minangkabau law area comprises the Padang highlands and the coastal area of the Padang lowlands (Sumatra's west coast), the densely forested riparian region (*rantau*) between the mountainous area and the eastern lowlands, the navigable part of the Siak, Kampar and Kwantan rivers (east coast of Sumatra and Riau) and also the lower Kampar region (excepting the coastal state of Pulau Lawan), and part of the lower Kwantan region (Indragiri). The *rantau* of the Batang Hari or Jambi river already falls within the Padang highlands. Kerinci and the remainder of Upper Jambi, on the other hand, belong to the law area of South Sumatra. Minangkabau colonies are found in Aceh, in Batang-Natal and Barus, in Muko-Muko (i.e. Moko-Moko, Bengkulen), in Kerinci and along the Upper Tembesi (Jambi), in Malacca [*248*] (Negri Sembilan as well as Kedah have been settled by Minangkabau from the L Koto * area), and even in Madagascar; though not in the Bataklands. The population of this law area is estimated at about 1,300,000. Areas which could probably be distinguished as law districts (p. 34) are, on the one hand, the tribal heartland, i.e. the three *luhak* (regions, lit. 'river basins') of Agam, L Koto and Tanah Datar, and on the other the 'border regions' (Willinck), i.e. the lowlands (*pasisir*) and the *rantau* [which actually extend to regions well outside the tribal heartland].

The comprehensive nature and logical coherence of Minangkabau adat law can still be recognized. In the long neglected areas, in particular Upper Siak (Tapung districts), and in *rantau* Kampar, *rantau* Kwantan (Indragiri) and *rantau* Batang Hari (the so-called Kampar,

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* [L Koto: the L stands for (Roman) fifty; in Minangkabau *limo puluh*, i.e. the 'Fifty Koto' - *Ed.*]

Kwantan and Batang Hari districts), it appears to have been least affected, and there, as well as in [a few other officially listed, non-autonomous chiefdoms], the indigenous administration of justice has been retained.

Law of Kinship

[Because the Minangkabau jural communities, unlike the territorially organized Acehnese, are predominantly based on genealogical principles], the law of kinship, which in this case is matrilineal, must be considered first.

The largest genealogical groupings are the twenty-two (or twenty-seven) Minangkabau clans (tribal divisions) with individual clan names like Koto, Sikumbang, Jambak, Bodi, etc. These clans are called *kampung* in the L Koto, elsewhere sometimes *kampung,* or (e.g. in Solok) *suku* (though *suku* usually denotes a union of clans). They are found locally interspersed and widely scattered throughout Minangkabau territory, and as can be easily understood people therefore often speak of a person's *kampung* when they actually mean only that part of his clan which is present in his own village. Fellow-villagers who are members of one clan need not live together in the same quarter of a Minangkabau village (*nagari*). The 'four *suku*' which are commonly considered to be the highest order of genealogical grouping [phratry] are either — if one takes *suku* to mean 'clan' — combinations of the aforementioned twenty-two; or — if one understands *suku* in its more [*249*] usual sense — do not constitute blood communities at all, but unions of mutually unrelated clans. The two *larèh* [moieties] — named Koto-Piliang and Bodi-Caniago — indicate only a common (and nowadays purely theoretical?) way of grouping the clan unions; one does not find exclusively members of the same *larèh* in each village (*nagari*). Splitting up of Minangkabau clans or the incorporation of families or family branches from elsewhere has not been recorded [but see 'Individuals', below].

Within the clan there is first the family * and then the household. The family is the unit on which the structure of Minangkabau society is based; a generic name for it does not exist, however. The members of one family are called *sabuah paruik, saparuik,* i.e. 'fruits of one

* [The author's terminology has been retained here, for it is clear from his subsequent explication that he refers to the (segmented) matrilineage - *Ed.*]

womb', but this term also applies to members of other families previously united with them. Though a family often occupies one *rumah* or house, it is far from true that every house shelters an entire family. The people themselves — according to Westenenk's information — call the members of a family *sacucuran, sakuriah, sakaum, sakupu, sapandam sapakuburan,* or describe them as *sakalian urang nan badunsanak ibu* ('all people whose mothers are each other's sisters or cousins'), or as *sakalian urang nan badunsanak niniëk* ('all people whose grandmothers are each other's sisters or cousins'). For the new taxation of 1908 our administration chose the name *kaum* for the family, and *pandapatan sakaum* for family income. Even when a family has to look for new dwellings the original home, the *rumah gadang* ('big house'), is not abandoned. In some areas an average family would number four women, a few brothers or mother's brothers and six or seven children; elsewhere it may have up to fifty members. If the growth in numbers makes a family split necessary (*gadang manyimpang,* 'splitting up the bigness' — which is not allowed as long as there are members who are only five or fewer generations removed from the common ancestress, except where there is irreconcilable strife — the closer *kamanakan* [kinsmen] who retain, or acquire, a common family head are often called *sawarih,* ('those with equal rights', those with the same *mamak*) in order to distinguish them from their other *sabuah paruik* (cf. p. 80). (For *mamak* in a wider sense, see below.) Families seldom (or never?) possess proper names.

[*250*] The family may be split up into branches, *jurai.* Household in the narrow sense means a mother with her offspring (*samandai*); in its broader sense it is either 'members of one pot' (*sapariuk*),[1] or 'members of one kitchen' (*sadapur*), or 'members of one house' (*sarumah*), this last when the family itself is spread over more than one homestead. In the lowlands it is becoming increasingly common to find a single household per dwelling.

The pattern of kinship is matrilineal: the children belong to the kingroup of their mother. The genitor/father is outside this blood community, and all the children of one mother are regarded as full-brothers and sisters. Both bachelors and married men never sleep in their own family house (*rumah dunsanak hambo,* 'the house of my sisters'). The former sleep in the *surau* [village hall] or in a *lapau* (*warung,* inn) or with friends, the latter in their wife's house (*rumah hambo,* 'my house').

Adoption in the sense of adopting children is unknown. What is

found, on the other hand, is adoption (full incorporation) of blood-related women into a family in order to prevent it dying out, or of men in order to incorporate immigrants. The latter are called *kamanakan mahidu* (or *mahiduik*?) *air tawar.*

Blood relationship is considered to exist only between those who are descended from a common ancestress. In contrast to adopted *kamanakan* (*mahidu air tawar*) and the freed slaves of the family with their offspring (*kamanakan dibawah lutuik,* 'children below the knee'), the *kamanakan* who spring from one ancestress are called proper *kamanakan, kamanakan kandung. Dunsanak* (*dansanak, dasanak, dangsanak, dusanak*) include sisters and brothers from one mother as well as male and female cousins on the mother's side.

Jural Communities

The smallest but most important jural community is the family living in one *nagari* and having its own authority and property. The family branch (*jurai*) and the household group are not jural communities.[5]

The clan (*kampung*) itself (—) is likewise not a jural community. Traditionally, *panghulu kampung* merely means the foremost head of the families of the same clan in the one village. Above the family the next [*251*] jural community is the *suku*, or, to be more exact, that part of a *suku* present in any given village — *suku* here in its more usual sense of a union of clans unrelated by descent. There are four such unions; *nan IX* ('The Nine'), *nan V, nan IV* and *nan VI.* Every village has core-families from two different *suku,* and a number has core-families from three of four *suku.*

How such combinations of clans (*kampung*) arose remains uncertain — (see pp. 62, 65 and 70 on groupings of four). The *suku* as such lacks administrative authority and property of its own but the section of a *suku* in each village has both, or at least its own authority. These *suku* sections rarely meet — except, for example, to depose a family head — and have no council quarters. The significance of the *suku* section lies in the part it plays in the village constitution. Since only the original families of a village, the core-families, have a role in village government, only those *suku* sections to which core-families belong are of any consequence. Individuals and families from other *suku* are ranked only as appendants of those core-families to which their ancestresses became attached. Lands devolving upon a *suku* section (see under 'Law of Succession') are mostly immediately re-allotted to the appropriate families if these are extant. However, it seems that in

various villages residential plots and dry fields remain *suku* land, *tanah suku*. In the border areas the *suku* section usually does not constitute a jural community. (*Suku* in the totally different sense it has in Aceh was discussed on page 59.)

Of great importance again is the jural community which stands above the *suku* section and which is called *nagari* (village, native municipality, village republic). It generally comprises a main village (*koto*) with subsidiary villages or hamlets (*taratak*; *pagaran*?), and in the highlands sometimes numbers up to 600 able-bodied men. Each such community contains two to four *suku* sections. Its property includes land over which it has the right of avail, and the open village hall (*balai*) situated in the middle of the village square (*tangah mèdan*). Our administration has in many instances formally combined two, three or four such adat communities into one new village, an 'administrative *nagari*' as it is officially called (e.g. ISb. 581/1908). It would [*252*] be of value to compare the former to the present number of *nagari*. *Nagari* treasuries do not appear to have been introduced yet in places where they did not already exist under adat (?) itself.

In many border areas there are no higher jural communities, but in the rest of this law area it is common to find loosely organized village federations, sometimes called *luhak* in the *rantau* (p. 123); they are usually referred to as 'the (however-many) *koto*'. Above these *nagari* federations again, there may here and there be very loose confederations, e.g. Kampar Kiri, VIII Koto Sitingkai, and so on. These, too, are sometimes called *luhak*, and *luhak* is also used for administrative divisions. Sometimes such federations or confederations are recognized by our administration as jural communities and even as little self-governing states (Kwantan, Indragiri, etc.). Usually, however, their existence is ignored, or the federations are distorted into Java-like districts (p. 60) under the odd names *laras* (*larèh*, p. 124).

Individuals

Immigrants (—) often attach themselves as 'child' (*anak samang*) to a local 'patron' (*induk samang*), a family head preferably of their own lineage or at least their own *suku*. The actual incorporation of newcomers (*kamanakan datang*) into a local family (with potential effects upon village government) seems to be comparatively rare. In accordance with the village's right of avail any person who settles there permanently must pay an adat fee. Because of family land rights it is rare, and even a cause for suspicion, for a

woman to move from her village. There is no mention of severing village or family ties other than by full incorporation elsewhere, or by expulsion. Children in their parents' household have no contractual capacity. (—) If one wants to speak of class distinctions among the Minangkabau, one must see their rank as determined by the length of their family's residence in the *nagari,* and further distinguish only between: 1) adat heads (recognized by our administration by exempting them from compulsory services) together with their family members and followers; 2) other free men, a category which even includes government-appointed headmen if they lack the proper adat qualifications; 3) the offspring of former slave women, who still occupy an inferior status although their position is gradually improving. As [253] a result of the *pusako* right (see below) the members of one family are equally affluent, even if it happens that merchants, for example, have valuable *pancarian* [personally acquired] property. A Minangkabau man can never be a slave in his own land, at least not among his compatriots. In this law area, the individual is of secondary, the family of primary importance, but this certainly does not mean that the individual has no independence.

Executive, Judicial, and Legislative Powers

The lowest level of autonomous authority is that of the family [lineage]. If a person refers to his *mamak* he means either the head of his family, or his mother's brothers and those of the latter's generation (i.e. *mamak* in wider sense); there seem to be no distinctive *mamak* (—) of households (above), nor of family branches (*jurai*). The family head is called *mamak rumah* ['head of the house'] even where the family is spread over more than one homestead (—), or *tungganai,* or *tuo rumah.* He is the most senior man in years of the oldest surviving generation in the family (sometimes from a designated, alternating branch), unless for reasons of personal unsuitability the family members together decide to deviate from this general rule. He controls all family property except, it seems, the shares specially allotted for temporary use; but he may not alienate any of it, only 'pledge' it in the four or five instances strictly defined by adat law (see below). He may allocate it in temporary use (*ganggam baruntuëk*), but divide it only if there is hopeless disagreement between two sections of the family (p. 125). In important matters he acts only in consultation with all the adult female members of the family and such male members as have remained in the village, such meetings taking place in the *rumah gadang* (p. 125),

where also men married into the family, *urang sumando,* will be heard, whether they are fellow villagers or outsiders.

(— —)

[*254*] Of the family heads indicated here — it is important to understand this in truly Indonesian terms — not all, but only a few, are village elders as well (*panghulu, panghulu andiko,* or *undiko*). Only the heads of the core-families that have inhabited the village from around the time of its foundation (*urang asal*?), and not the heads of more recent families, the newcomers, can hold this position; and should a core-family split up into new families only one continues to provide a village elder. This *panghulu andiko* therefore represents, first, the family to whom he is *mamak,* but often also one or more other families which came into being through subdivision or later settlement in the village. Such a collectivity of persons — embracing sometimes one family, sometimes more than one — is called the *payung* (['umbrella'] of the *panghulu andiko,* the individual members his *anak buah.* He himself bears the title *datuk* (p. 59) together with certain insignia of office. His house may have *anjung,* i.e. certain extensions (*rumah baranjung),* provided the village has a council hall and mosque. He must live in the village, and is assisted by two titled officials from his *payung,* his *dubalang* or 'bailiff' and his *pagawai* (in other places: *manti)* or messenger. (—) Hadjis are not permitted (since *padri* times?) [2] to become or remain *panghulu.* The *panghulu* must ensure that his *anak buah* live in accordance with adat rules and government regulations. Where a *panghulu* is in authority over more than one family, this office sometimes devolves in a fixed order of rotation from one family to another, called *adat balègar.* The offices of *mamak* and *panghulu,* and the titles (*galar*) associated with the latter, belong to the *pusako,* family estate, or sometimes remain the property of a family split up earlier. The elevation to the position of *panghulu* is a matter for the jural family (see below); the approval of the *suku* authorities (i.e. of the *suku* section concerned) is required, and the office is [*255*] handed over in the presence of all the *panghulu* of the *nagari.* Here, too, the hereditary principle is in fact modified by election (p. 91).

If one understands the institution of *payung* groupings under their *andiko,* then the remaining aspect of village government amounts to this simple rule: either the village elders belonging to the same *suku* section are represented in the village executive by one of them (*suku* head) with his assistants, or — in other places — all the elders

belonging to one *suku* section sit on the village council. In both cases the form of village government is republican, for every decision of importance is preceded by *mupakat* [agreement based on mutual consultation, see below].

The difference therefore lies in the constitution of the *suku* section authority. In the L Koto and Tanah Datar, and apparently also in the *rantau* Kampar, it consists of one man, the *panghulu suku* — also known as *panghulu pucuk* ('crest' *panghulu*), *datuk nan kaampèk suku, datuk barampèk* — that is to say the foremost of the *panghulu andiko* of the families belonging to the *suku* section concerned. In Agam and elsewhere, however, the *suku* section is governed by all the *panghulu andiko* together. The difference is not very marked from the point of view of the *suku* section (though it is for the *nagari*) because matters concerning the *suku* itself are rare: confirmation of *panghulu* appointments and deposition of *mamak* (above) appear to be the principal ones. Like other *andiko,* a *panghulu suku* has his helpers: a *suku* 'commander' or *dubalang* who, for example, expelled outlaws; a *suku* orderly or *manti* (in some places: *pagawai*), one of whose functions was to be 'interpreter' in the courts; and, usually, an additional third man, a *suku* religious official or *urang malim* (*tuanku*). These assistants do not belong to the *andiko,* and therefore do not take part in making decisions. Together with their *panghulu suku* they are called the *urang ampèk jinih* ['tetrarchs'], or — if one of their number is missing — *urang tigo jinih.* In Agam and other places, only the ordinary *andiko* have assistants with titles (*galar*). Where the office of *panghulu suku* exists, a new *suku* head (from the same *kampung,* clan, as his predecessor's?) is chosen by the *nagari* authorities; and he may in one *nagari* belong to a quite different clan from that of the head of the same *suku* in a neighbouring *nagari.* The *suku* head (*suku* section head) does not deal with individual commoners, but only with their *andiko;* but no enforcement of adat law against an unwilling party is valid without his prior knowledge and sanction.

[256] At the apex of the *nagari* there is thus, traditionally: either — in Agam, etc. — the joint council of *panghulu andiko,* i.e. the *rapèk panghulu* or *rapèk nagari,* meeting publicly in the *balai*; or — in L Koto, Tanah Datar etc. — the joint *panghulu suku* (as many as there are *suku* sections, p. 126). The latter are referred to as *panghulu* (*nan*) *kaampèk suku, datuk nan kaampèk suku, datuk nan barampèk suku,* whether jointly or as individuals, and often recognize one of their number as *primus inter pares,* the *panghulu pucuk nagari* (—). A third

alternative — in the *rantau* Kampar, *rantau* Kwantan etc. — consisted of twin leaders, *datuk duo sakoto* ('the two per village'), namely the *pucuk gadang dinagari,* village headman in charge of land matters, and a *pucuk gadang karantau,* the *rajo,* harbour or river master in charge of affairs on the water front of navigable rivers, which involved dealings with strangers. The two to four religious officials or *urang malim* (above) are called the 'four *tuanku', tuanku nan barampèk.* Government in all *nagari* is most democratic, mutual consultations (*mupakat*) being held with all the core-families in the village on all matters of any importance. The *andiko* and other family heads, as well as other men of standing, are called *nan tuo tuo,* elders. Where *suku* do not exist (p. 127), the village government is based directly upon the respective family authorities (—).

The government of the village federations consists of the combined village authorities. If there exists a confederation of such federations, then each village federation is represented by an *urang gadang* or *kalipah* (how is he appointed?). Such a confederation then appears to be under the control of the combined *urang gadang* (*nan* V, and so on) with a *rajo* — perhaps here, too, a harbour master, but in any event not a solitary ruler — acting as a mediator. Unanimity of decisions is required in all collegiate forms of government.

This whole system, however, has been interfered with by our administration. Alongside the real *panghulu suku* (*adat*) we have appointed supervisors of compulsory services, *panghulu suku rodi*; alongside the true village authorities, even where *pucuk* (above) were [257] unknown, a *panghulu kapalo,* and above them district headmen in the Javanese style, *tuanku laras.* In the environs of Padang there appear to be nothing but headmen appointed by the administration. Yet, after more than fifty years, in spite of all efforts to breathe life into them (—), these misconceived institutions have still not taken root: everywhere people still know and recognize their adat dignitaries and headmen.

The personnel of the numerous Friday mosques (p. 69) — *imam katik bilal,* the 'free ministry', — are not part of the traditional *nagari* government and its indigenous officiants, the so called 'adat ministry' or *malim suku* (above). Since a normal *nagari* has one or sometimes even two Friday mosques, and thus needs no lower village house of worship such as exists for instance in Aceh (p. 62f.), these *malim,* where present, have nothing to do with the Moslem ritual worship (*sumbayang*) but only with marriage, burial, religious levies, slaughter, and possibly teaching (—).

As regards genuine taxes, only toll rights (on forest products and so on), harbour dues and sea-fishing taxes were known, and perhaps mosque dues. In addition to these, there were compulsory services to village heads, and certain levies — *bungo kayu* [cutting rights] and so on — in connexion with the right of avail over land (see below). As adat law prohibits distraint upon *pusako* property for unpaid taxes, and personal property is usually scant, perhaps a system should be considered whereby people could pay off their tax debts through work (—). The principal source of income for the indigenous head was formerly the administration of justice.

Administration of Justice

[258] This was traditionally carried out by the village authority: thus in Agam it was done by the *rapèk nagari* in the *balai* on the village square; in L Koto and Tanah Datar by the *panghulu suku,* subject to appeal to the joint *panghulu suku* of the village; in the *rantau* by the twin headmen. The *suku* orderly (*manti, pagawai adat* — see p. 130) lent his assistance as intermediary between the parties and judge. The litigation pledge (p. 72) was called *tando suku.* Indigenous counsel, *kapalo koto,* were known (also traditionally?). The judge and his helpers were entitled (in all matters? cf. pp. 72-3) to the *uang jurah* or *taïë amèh* (judging fees). Revision (*bandiëng*) of a judgment could be requested. Litigation before a village federation tribunal was (is) an exception, the *rajo* (above) playing an important role in such cases. Unanimity of judgment had to be reached; the attendant public could join in the process.

Except in the few areas where the indigenous administration of justice has not been superseded by our judicial provisions of 1874, this village jurisdiction has disappeared, though the procedure still survives in cases of amicable settlement, *ba(r)damai,* by village authorities. The retention of the name *rapat* (popular assembly), now carried over to government courts for a whole administrative division, is humbug. The court fees, too, now come into the hands of quite other people than adat functionaries.

As a means of self-help, or for the protection of one's rights, certain courses of action were recognized, e.g. *tariëk,* seizing some property of the other party or of a kinsman or fellow-villager of his, and notifying one's own village authority of having done so. In order to pay for someone's judicial fine, money may be raised through 'pledging' the patrimony of his family (p. 139). Formerly, hostageship, attachment of the

person, was also known. For contempt of court there was banishment (p. 143).

The evidence of a witness whom the adat required to be present at a transaction (pp. 73, 74), was valid also if given by his kinsman whom he had deliberately entrusted with his testimony (*pituah*). As witnesses of this kind (required, for instance, at the administration of a deceased person's estate) the *panghulu* and other family heads were [259] preferred. In land disputes the unanimous testimony was required of the four surrounding neighbours or *pasupadan* (—), the *jihat nan ampèk* or *ampèk bintalak* ('the four borders'), as the individual land holders or the heads of families are called whose *pusako* or *ulayat* land borders on the disputed land. Likewise recognized was the sacramental *pituah* (*umanat*), uttered within the family circle by a dying person concerning his *pancarian* [self-acquired] goods and debts, or by a dying *mamak* concerning the family estate controlled by him (p. 128). Quite often important legal transactions were accompanied by sacramental acts (e.g. the slaughter of an animal) or performances. The great oath, sworn by an entire family with regard to disputed land, usually had the effect of turning the quarrelling families into irreconcilable enemies.

Religious administration of justice no longer exists in this law area; in villages in the *rantau* (pp. 123, 131) one sometimes finds a *kali* as an official marrying off women without blood-*wali* (p. 83f.). It seems that formerly in some areas (—) the *imam* (p. 131) adjudicated in matrimonial disputes at a meeting of mosque personnel and *malim* with all the *panghulu* who attended the Friday service (*sidang jumaat*). An appeal procedure is said to have been added later, but the whole institution seems to have been abolished round 1880. The *tuan kali*, who acts as adviser for adat law (pp. 17, 76f.), is often an unimportant man conversant neither with indigenous law nor with the religious law.

Indigenous legislation [3]

The separation of legislative and executive powers is as little known in the higher and lower Minangkabau jural communities as in Dutch provinces and municipalities. Local adat rules (*cupak*) can be changed by *sapakèk* (*saïyo, sakato*), that is, the unanimous vote of all the vote-holding heads in the village after a *mupakat* meeting (this kind of legislation is becoming rare); regional adat law in a like manner by the vote-holding heads of the *luhak* etc. concerned; and the general law of the land by all the vote-holding heads in the country, i.e. the *luhak nan*

tigo or *alam Minangkabau.* The adat law of the lower level must not conflict with that of a higher level. Families and *suku* sections lack legislative capacity. The ruler of Pagarruyung used to be regarded as the guardian of the general law of the land and supervisor of its revision; our administration might consider proceeding in a similar manner.

Adat Inter-local Law

[*260*] Two (or more?) villages consider themselves to be allied, *ba(r)tali,* either because one originated from the other (mother and daughter village), or because of a formally (how?) concluded alliance (with what legal consequences in the past?). The old neutral areas (p. 78) between villages were called *tanah rajo* or *tanah kubu*; nowadays they are either brought under cultivation (*harto dapatan*) or added to *ulayat* land. Professional soldiers are unknown; in the little wars (*parang adat, parang batu*) fought between villages on the *tanah rajo* the *suku* 'bailiff' (*dubalang*, p. 129) played a prominent part. Peaceful development of trade and commerce was impossible in the more turbulent times of old; nowadays the indigenous wholesale and retail trade has become important. After the disturbances of 1908, reconciliations were celebrated in old adat fashion.

Law of Marriage

Here too the rule of exogamy is fundamental. That is to say, people are allowed to marry within their own country, *nagari,* and even *suku* (in the sense of a union of clans, p. 124), as long as they marry into a clan (*kampung*) other than their own. In some border areas observance of this rule has become notably lax.

Marriage is governed by mother-right; the man comes to live in his wife's household (pp. 79, 125) although he is not incorporated into her family; the children belong to the mother; the property coming to the conjugal family is largely that of the wife's family. In the border areas the position of the husband is becoming more important, partly through Islam and partly through other circumstances. The same is true of locally transferable government officials.[4] Child marriages also occur. Betrothal becomes binding on the payment of betrothal pledges (p. 86) as visible tokens.

The marriage (*sumando, nikah*) is concluded according to Islamic law, that is by a patrilineal guardian of the woman (*wali,* p. 83), normally with the assistance of the officiant (*malim*) of the common

suku, or of both *malim* of the parties' respective *suku;* some records mention help from mosque officiants. A woman without a paternal *wali* will almost always require the appointment (*tahkim*) of a special marriage agent [*wali hakim*].

[*261*] Upon the termination of the marriage, property jointly acquired during the marriage, the *harto suarang,* is shared out equally (*suarang baragih,* or *diagih*; not *dibahagai*) — after deducting joint debts? — between both spouses, or between the surviving spouse and the family of the other. *Suarang* property seems to be rather rare. A Moslem marriage gift (p. 84), paid only later, is known. The husband receives wedding gifts from the wife. What the husband possessed and brings into the marriage is called *harto pambaoan*; what the wife received and brings into the marriage is *harto dapatan.*

Dissolution of marriage in Islamic fashion, usually by a single repudiation, is frequent. The strong position of women, here as in Aceh, obviated the need for conditional repudiation as a regular adat practice (what happens in the border areas?). One also hears of the dissolution of marriage at the request of both parties upon the acceptance by the wife's family of a notification to this effect.

Although the husband regards his wife's house as his home, as the genitor of his children he has under adat law no paternal authority in that house. There is as little question of a husband's reduced contractual capacity as there is of a married woman's. In the tribal heartland there is no need for legal guardianship because of the unity of the family.

Adat Pusako, Adat Kamanakan

Under this 'family estate law' or 'rights of matrilineal kinsmen' the Minangkabau understand the complex of adat rules regarding the transformation of personal property into family estate.

The principal rule is this, that a person's self-acquired property, (*harto pancarian,* private property) after deduction of debts, devolves after his death upon his [maternal] family as family property, (*harto tuo, harto manah, harto sako*; or, after the lapse of one generation, *harto pusako*). This is true not only of land and money, but apparently applies also to clothes, tools, weapons, utensils and jewelry. The term *adat pusako* is associated with this rule.

The second rule appears to be that, though the whole family [matrilineage] is owner and beneficiary of this new family property (hence, [*262*] *adat kamanakan*),[5] yet the next of kin of the deceased person

have precedence in the enjoyment of these goods. This priority of benefit, controlled by the *mamak,* applies in the first instance to children in respect of the former property of their mother; then the deceased's brothers and sisters born of the same mother; after that, her sister's children; and, finally, her mother. A deceased woman's share may be claimed by her children. Once this privileged first generation has died out, however, it appears that the benefit of the new family estate — now *pusako* instead of *sako* — thereupon devolves upon all *kamanakan* or family members equally, unless all *warih* (p. 125) consent in granting temporary allocation (*ganggam baruntuëk*) of the property to the family branch or smaller unit concerned.

As stated, debts must first be settled out of the personally acquired assets which are left behind. If these exceed the inheritance neither the afore-mentioned next of kin with their personal property, nor the family with its family estate will be liable for the excess. Whether the deceased's rights of user in respect of land or movables held in return for a loan * also fall to the family estate is not clear: it seems that they do. But property of *urang dagang* ['newcomers' — p. 127] seems to be partially annexed by the village in which they came to settle. When joint marital property is divided after the death of one of the spouses, the surviving spouse's right to one-half of it has, of course, nothing to do with the law of inheritance.

Law of Succession

A right of inheritance from one individual to another is unknown in Minangkabau adat law: either with regard to material goods, to which the *adat pusako* applies; or with regard to offices and titles, which are always family property and remain so though the incumbents change — sometimes in order to give each branch its turn (p. 129). Hence the term *warih* (*waris*) does not mean heir (p. 81) but *kemanakan* (p. 126). There could be no question therefore of any religious jurisdiction in inheritance disputes (cf. pp. 21, 76); or of wills (but see below); or of individual 'hereditary' proprietary rights.

The only right of inheritance is that devolving upon families, *suku* sections and *nagari.* For should a family die (i.e. become extinct, [263] *punah*), or if its surviving members live elsewhere but do not wish to resettle in the *nagari* (below), its family property (including both offices and titles) devolves on the *suku* section, which will allo-

* [See pp. 102(*n*)-3, 107]

cate it immediately to the other families (or to one of them?) of the same *kampung* [clan] living in that village, unless the family had split up earlier (*gadang manyimpang*) — p. 125), in which case the other part of the subdivided family gets the property; but residential plots etc. do remain in the same *suku* section. Should the last survivor or only family of that clan die out, then the property remains that of the *suku* section concerned. If the only family of a *suku* section in the *nagari* dies, then the *nagari* inherits the property and can subsequently re-allocate it.

Not only in the border areas, however, but also among headmen and rich men in Agam, and in the areas of the *padri* sect, is an individual right of inheritance to *pancarian* [personally acquired] property becoming increasingly common,[6] following the male line in accordance with Moslem law. It appears in a moderated form in places where — as in Painan and Air Haji — half the inheritance is passed on from the father to his children and the other half becomes *pusako* property; and is more radical in e.g. Indrapura, where the children get everything. It sometimes takes the form of giving such property before death — and sometimes also the widow receives part of the inheritance. It is not the task of our administration to work against such a reform. Nor do wills in cases of voluntary submission to European law appear to be unknown, though there is reason to question the legal validity of such submission for this purpose.

Land Law

The most important right of all is the right of avail over land and water, *hak ulayat,* expressing itself in the usual ways (p. 95f.). In most areas *ulayat* right is held by the *nagari,* and in the heartland (and outside?) extends to every acre, whether tilled or untilled, of the soil to which the population feels closely attached. In many regions, however, the *ulayat* right is held severally by the core-families in the village (pp. 126, 129), and only reverts to the village if the family dies out, and with it the *suku* section concerned. As regards the village federations, the right is sometimes ascribed to the *rajo* (p. 131), but sometimes explicitly denied to him. Land subject exclusively to this right [*264*] is called *tanah ulayat.* Strangers pay to the community endowed with the right of avail a periodic fee (*bungo tanah, bungo kayu, bungo pasir,* etc.) for the profitable use of it. Permanent transfer of the right of avail appears to be impossible (see, however, p. 140).

Adat-ownership of land (respected by ISb. 94(f.)/1874, s.l) is held

by the families living in the village, or (till his death) by the individual reclaimer of virgin land; the word *harto bando* seems to include all immovable property subject to adat-ownership. According to some informants, individually owned land — rare in the heartland — may never be alienated because of the inheritance right of the family; according to others, not without the permission of the head of the family or of all *warih* (p. 125). According to yet others, it may be freely disposed of, though the *mamak* or *kamanakan* must be informed. Presumably this is an institution in which adat law is in a state of growth (p. 24). Family lands, often widely scattered, may not be alienated, wasted, or — except when the family is splitting up — divided. It is, of course, permissible to increase its value, and to utilize it profitably, but it may not be distrained upon or encumbered, except for purposes to be mentioned shortly. There is thus a great difference between adat-ownership and European individual ownership. Nevertheless, ordinary sales of family land are beginning to occur, either with, or even without, reserving the right to buy it back within a fixed time limit. For the building of roads or irrigation works land is requisitioned for an indefinite period, not expropriated. Neither individuals nor families may acquire land, or (when moving residence) retain land within the domain of a village other than the one in which they reside; which is one of the manifestations, sometimes no longer observed, of the *ulayat* right of the *nagari*. In important transactions about land the presence of the village authorities and the four adjoining neighbours is required. For the situation regarding the land of *suku* section or *nagari*, see pages 136-7.

Temporary tenancies (p. 100) are, it seems, found where certain *ulayat* lands are either used for short-term cultivations (e.g. of sugar cane), or are given to a non-village member for a limited or unspecified period for cultivation or other purposes; neither of these activities [265] count as occupancies giving adat-ownership. Also *suku* land is allotted on this basis for residential plots. Such temporary tenancies are (in all cases?) granted orally in the presence of the village authority and (especially) of the heads of the *ulayat*-holding families. People have sometimes wrongly concluded from the existence of these tenancies (never of wet fields?) that a great deal of land must be in individual ownership (*pancarian* land), which — at least in the highlands — is not the case. Such lands cannot, it seems, be alienated or transferred in return for loan.

The right of use of land (p. 100) occurs there where, either through

temporary allocations, *ganggam ba(r)untuëk* (pp. 128, 136), with the agreement of all *warih* — e.g. to each of three family branches (*jurai*) in turn, or to particular mothers — or by virtue of the *pusako* right itself (p. 235f.), certain people are temporarily privileged to use certain parts of the immovable family estate (such lands then appear to be under the surveillance though not in the control of the *mamak*). But the normal right of use is that which all the family members (primarily the women) in the village have over the proceeds of the family property in accordance with the *mamak*'s dispositions — unless they are wilfully idle. Newcomers to the village, who cannot yet have their own family property there and who have lost their property rights in their old village, can only to a limited extent gain a share of this user right in respect of the property of the family that gives them protection (p. 127). The right of use cannot be alienated.

Whoever wishes to occupy virgin land requests his *mamak* for a piece within the right of avail of his family, that is if the latter is an *ulayat* holder; if not, the *mamak* asks the village authority (i.e. the headmen) on his behalf for a piece of land over which the *nagari* has the *ulayat* right.

Share-cropping transactions — *mampa(r)duokan,* half-sharing, etc. — are known, and require the presence of the village headmen; renting land is rare; lending land between spouses more common.

When land is to be sold, distrained for debts (p. 143), or given over in return for a money loan, close relatives have a right of preference.

A tenancy in return for loan, preferably in favour of a member of the family or of a related branch of it, implies the profitable use of the [*266*] land for at least a few seasons; the creditor-tenant may not press for the return of the money. What was said about alienation on page 138 applies to tenancy of individually owned land. As regards family land such tenancies, starting with the most recently acquired family land, is permitted (but not obligatory) in only four cases, that is if the family requires money for: *a*) the family burial ground; *b*) the wedding of a daughter of the family; *c*) the appointment of its *panghulu* (p. 129); *d*) the payment of a judicial fine imposed upon one of its members and not already paid by other members from their personal assets (*utang tangah mèdan*). In addition, this transaction appears to be obligatory if it is necessary for the payment of the family's own debts. The land transaction is concluded by a visible act in the presence of the people listed on pages 128-9: sometimes by making a notch in one of the main doorposts of the house, nowadays often by

making up a written document as visible token. The tenant-right is often subject to an annual recognition of the owner's right in the form of a basket of rice from the harvest, or to a periodic repetition of the transaction itself. The land remains redeemable (*tabuih* or *taur*) at any time (p. 103). Even if the transaction is later followed by a transfer of proprietary rights, *jual* (is the outward sign of this agreement the placing of posts or stones?), the possibility of redemption is not irrevocably lost (therefore, not a 'sale'), and no more dependent on the creditor's consent than before (which would amount to the same thing); but the actual chances of subsequent redemption are rendered exceedingly small (—), because it can then be effected only by paying at least double the principal sum. Indivisibly fused in this concept of *jual* are therefore both what we would call pledge and what we would call sale with an inalienable right to buy back. This transaction is therefore impossible with a person or family not belonging to the village. Here and there a form of adat-mortgage (which does not, therefore, require the land to be handed over for use) seems to exist.

Negative prescription of land rights is unknown. For *tanah rajo* see page 134. Family houses are presumably regarded as immovable goods. The prohibition of alienation of *ulayat* or *pusako* land is not longer generally observed (p. 137).

Law of Chattels

In the case of adat-ownership of goods other than land and water — slaves, too, until 1875 — the same rule holds as for landed property, [267] except that the free disposal of movable *pancarian* property (e.g. forest products) is far more readily considered to be lawful, and that there is no question here of a right of avail (p. 106). Transfer of movable *pancarian* property through sale, barter or gift is of course frequent; the movable product of *pancarian* property is likewise *pancarian*. It seems doubtful whether the inalienability of movable *pusako* goods (p. 135) is or can be always enforced. The movable return on family property (e.g. rice, money) is itself also family property; so when government taxes are recovered from this income, this means also a change of adat law, albeit a harmless one, which is then preferably disguised as the fictitious result of *mupakat* and *sapakèk* [mutual consultation and agreement].

Title names (*galar*, pp. 129, 136) are part of the *pusako* property.

The *ijab* contract, which is reported to exist in the southern areas, appears to give one party the right, against payment of a small gift as

a tangible token, to buy a specified object from the other party at a future time, i.e. to have it transferred then against money paid or promised.

The right of use enjoyed by family members extends of course also to movable *pusako* property (does this also involve temporary allocations — p. 139).

About profit-sharing, hiring, money and other loans, etc., the information is scanty, probably because these sorts of transaction are themselves rare (this is almost certainly true of wage employment); nevertheless, lively trading takes place among the Minangkabau. Adat partnerships are not uncommon; partners are called *urang barakanan.*

The limitations mentioned on page 140 also apply to 'pledging' (as security, not for user?) of movable *pusako* property; *jual* [transfer] transactions of such property are unlikely to exist.

Voluntary suretyship seems to be unknown (if it does exist, is it based on a promise without a visible token?). Mutual or reciprocal assistance (p. 111) is known. It is not clear which transactions involving movable goods (p. 106) require the presence of headmen and witnesses (do cattle sales, for instance?).

Debts which cannot be met from a man's personal property after his death cannot be claimed from another person. Debts of individual [*268*] family members may not be paid out of family property, except for judicial fines (*utang tangah mèdan,* p. 139), and then only, when necessary, through the encumbrance and not the alienation of *pusako* property. Debts owed to individual tradesmen and incurred by the appropriate family head, however, were regarded as family debts and could thus be claimed from the family.

The Minangkabau have repeatedly been praised as honest traders.

Law of Wrongs

The Minangkabau law of wrongs has in common with the Acehnese and Gayo-Batak law of wrongs that it provides sanctions for adat rules in every area of adat law, sanctions which it would be impossible to divide into civil and criminal. But it distinguishes itself favourably, and remarkably, from both other law systems in that it enumerates these impermissible acts exhaustively: not in the style of our own statutory definitions, but rather in the style of the (explicated) headings of our Dutch categories of special delicts ('offences against the public authority', 'maltreatment', 'fraud', etc.). The twenty categories of wrongs, the so-called *undang undang nan duo puluh* or 'twenty com-

mandments' therefore leave ample scope for the development of the law while checking arbitrariness, and they are quite unlike a codification or legal text book. They comprise (*1-8*) delicts against property: *1*) theft, *2*) robbery, *3*) robbery with violence, *4*) verbal fraud, *5*) material fraud, *6*) arson, *7*) slight damage, *8*) severe damage; and (*9-20*) wrongs against the person: *9*) wounding and manslaughter, *10*) assault, *11*) poisoning, *12*) offences against good morals, *13*) slight abduction, *14*) severe abduction, *15*) denial of physical freedom, *16*) wrongs against the public authority, *17*) causing a disturbance, *18*) challenging another to fight, *19*) fighting, *20*) incitement and slander.

Marrying within the clan (p. 134) is classed as incest (*sumbang*) under (*12*); ignoring a new *mupakat* rule (p. 130) as a wrong against public authority under (*16*), etc. (Where do negligence and infringements of title privileges fit in?) Did such a penal law deserve to be summarily set aside after 1873, and replaced by our one-sided statute book?

The legal sanctions are sometimes fixed, sometimes maximal. They are mostly fines of varying severity, the heaviest being the blood-money, [*269*] *bangun* (*dandang, diat*), for manslaughter; next, the lesser 'injury-money' or *pampèh,* and so on. Besides these, the death penalty, personal hostageship, corporal punishment and exposure to public ridicule (the last three as alternatives to fines) may be inflicted. These punishments, too, can be coupled with compensation, propitiatory gifts (p. 116f.) and expiatory or reconciliatory ceremonies (p. 134). If necessary for the payment of a fine or compensation of the twenty commandments, family property could be encumbered (p. 139). Evidence of remorse reduces the severity of the punishment.

Sanctions for wrongs are directed either at an individual or at a group having the right of avail (*nagari,* etc. — pp. 95-7, 136). Vicarious liability of members of the family, *suku* or village does not exist, except what has been said about *tariëk* (p. 132) and *utang tangah mèdan* (p. 139). The phrase *tanggung mananggung* [collective suretyship] made people believe in all sorts of vicarious responsibility without the facts having been properly researched. The element of wrongful intent is of little consequence in accomplished wrongs (p. 114).

Prosecution at the instigation of the community authority seems to be almost unknown in the law of wrongs.

In the sphere of the indigenous administration of justice the adat law of wrongs is probably still being applied (—). In the sphere of government jurisdiction it has been destroyed by the Native Criminal Code

and [the judicial regulations of the] *Sumatra Reglement*: in the first place by abolishing adat delicts, and secondly by turning *bangun* and all other adat fines into civil reparations as distinct from criminal punishments (—).

Legal Remedies

Self-help was, of course, common in the past.

It seems most improbable that the private property of the family members could be subject to judicial distraint for the payment of lawfully incurred family debts (p. 141). The fact that family property is [*270*] liable to distraint has nothing to do with vicarious liability of family members, but follows from the fact that the family itself has legal personality; property which has been in family hands for the least length of time is seized first.

The individual is responsible for his own debts with his *pancarian* property and, formerly (p. 133) his person (hostageship); but not with his 'share' in the family property, for such a share does not exist (p. 138f.). The family paid only when the debt had been incurred through its representative headman (p. 141) or — though this is optional — before quittance by means of *utang tangah mèdan* (p. 139); thus not, for example, for the tax debts of its members.

Liability after death does not exceed the deceased's estate. The *suku* and *nagari* are never liable for the debts of their members. Do *tariëk* actions (pp. 132, 142) indicate a former vicarious liability of kinsmen and fellow villagers?

As a punishment for (specific?) wrongs such as contempt of an adat judgment (p. 133) there is *buang sirih* (warning) or, in the case of recurrence, *buang puluih* or *buang tingkarang* (ostracism). The family of a man convicted under the twenty commandments can, by expelling him from the family circle, *buang utang,* cease to be concerned with his convictions. Anyone who constantly violates adat law can be punished by total banishment from the village, *buang bidak,* which is considered to be a most severe punishment. Since government courts can no longer punish marriage within the clan (p. 142), such banishment has become the only sanction for this adat wrong. Killing a person thus outlawed went unpunished. Banishment is done by the *dubalang* (pp. 130, 134) according to sharply defined adat forms. (Are all these four adat punishments for men only?)

Against a *mamak* or an *andiko* there is, in addition, the sanction of deposition at the request of their people, either by all *andiko* of the

suku concerned, or by all other *andiko* of the *nagari*; it is done (in a [*271*] judicial process?) in the village hall. Every member of the family (especially a woman) and every *panghulu* from the same *suku* can demand redress for the unauthorized actions of a *mamak*.

Development of this Adat Law

The spontaneous growth of this adat law (p. 24) has already revealed itself in the development of a more centralized administration (p. 130f.), the stronger bond between genitor (father) and children (p. 137), the emancipation of the offspring of slaves (p. 128), greater freedom in the disposition of *pancarian* property (p. 137), the sale of family land (p. 140), and the permissibility of owning land in another *nagari* (p. 138). In similar fashion one can perhaps expect a gradual modification of the principles of unanimous decision (pp. 132, 133) and of the inalienability of the *pusako* crops (p. 140), and so on. If no guidance is given to the development of patrilineal inheritance (p. 137) there may be a danger that Islamic law will take over entirely (Snouck Hurgronje, 1906, II:316-7). The most important prerequisites for the development of the adat law here appear to be: the restoration of government by traditional leaders — albeit under the guidance of properly trained and transferable indigenous administrators in the larger complexes; restoration of the adat constitution of the *nagari* and of its administration of justice under the supervision of the indispensable higher tribunals; repeal of [some ill-conceived judicial] sections of the *Sumatra-reglement*; and the recognition of the *ulayat* right [of avail] instead of the assumption of State dominium of 'ownerless' land.

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CHAPTER VII

CENTRAL AND EAST JAVA, WITH MADURA *

[October, 1917]

[*504*] [We can now give] our attention to two islands said to be without adat law or to have only a scanty remnant of it. As long as it was believed that Javanese adat law had to be explained in terms of what was known about Java itself, there was bound to be disappointment owing to lack of information. When it came to be thought that the adat law of Java, like its language, could be learned from the Javanese principalities,** there was confusion as well, for much had been changed or superseded here by royal institutions and despotism. The adat law of Java finds its appropriate place only when we recognize it to be part of that of Indonesia, with the same propensities and shortcomings as in the other law areas. It seems strange that there is no work on Javanese custom of the same value for the study of adat law as that of Snouck Hurgronje on the Acehnese and Gayo, Adriani and Kruyt on the Barèe-speaking Toraja, or Liefrinck on Bali and Lombok. When Van Ossenbruggen (1916:15-16) notes how 'precious little' is known about Javanese village life and thought, he seeks an explanation in the fact that, on this island in particular, Europeans live 'alongside, not among, the indigenous population', and he considers it necessary therefore to have a scientific expedition sent out specially to Java. Let us hope that such an expedition would give due attention to adat law.

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[*508*] Central and East Java and Madura are Moslem areas. Consequently, the adat law shows elements of Moslem law — for instance in the marriage contract, the dissolution of marriage, and various matters concerning inheritance and pious foundations. Protestant

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* [Selections from pp. 504-654 of the original.]

** [i.e. the four self-governing states in Central Java: Surakarta, Mangkunegaran, Yogyakarta and Pakualaman - *Ed.*]

Christianity, which has about 14,000 adherents, is to be found in Majawarna and surrounding areas (since 1851); in various parts of Kediri (since 1845); in Malang and environs (since about 1870); Besuki (since 1885); the region of Japara (since 1852) and Salatiga (since 1870); and there are about 350 Catholic Christians, mostly in Kedu. Elements of Christian origin appear in the adat law of these *serani* or *keristen*. The half-Hindu inhabitants of Tengger appear to have gone over to Islam. Among these former Brama-worshipping pagans, who kept a fire constantly burning in their homes, the Brama priest — who was sometimes also the headman of the village — was called *dukun;* their marriage, whether or not solemnized by a prior Moslem ceremony, used to consist of a communion meal of ancient origin with this *dukun* (*Eindresumé* III:265; and more recently, Kohlbrugge, 1901).

Delimitation of the law area

[*509*] When a Sundanese from the Priangan region says that he is going 'to Java', he means the purely Javanese-speaking regions, that is, Central Java and the principalities. The present adat law area is in one sense much wider and in another narrower. Narrower, because it excludes the residencies [administrative divisions] of Yogyakarta and Surakarta; wider, because it embraces Madura and East Java as well as Central Java. Consequently our law area includes eleven of the seventeen residencies of Java and Madura: Pekalongan, Semarang, Rembang, Banyumas, Kedu, Madiun, Kediri, Surabaya, Pasuruan, Besuki and Madura. Perhaps the eastern fringe of Cirebon could be included as well. Madura, and the residencies of Besuki and Pasuruan with their considerable Madurese population, exhibit some peculiarities in their adat law, for example, with regard to *tukon* [marriage gift] and *pamesi* [fishing tribute], which would warrant a distinction between two law districts (p. 34) but not, it seems, a division into two law areas, that is, one comprising Central Java (and Surabaya) with 20,000,000 Javanese, and the other East Java (excluding Surabaya) and Madura with 4,500,000 Javanese and Madurese. Among Indonesian immigrants to this area one finds in particular Makasarese, Buginese and Balinese. In some of the large centres the immigrants have their own headmen and town quarters (— —).

[*510*] The former extent of the Javanese principalities is a complicated question. In 1812, Kedu (the old residency, without Bagelen) was annexed by the Government, and in 1831, after the Java War

(1825-1830), Bagelen, Banyumas, Madiun and Kediri were torn from the principalities. But until then, their territory still comprised six of the present-day residencies of Java; and as late as the 18th century even the entire law area was within the realm of Mataram. Yet anyone expecting to find Mataramese instead of Central Javanese adat law, or attempting like Raffles (—) to know the local adat law from its distorted form in the principalities, would be badly deceived. The key to understanding the adat law of this area — as of Bali — is to [*511*] distinguish between ancient indigenous village institutions and subsequently imposed royal institutions, to examine the interaction between them, and to recognize that it is only where royal institutions are manifested in the apanage system that they suppress village institutions. It then becomes evident that, in *this* law area, the influence of princely government has left all the major features of the old adat law unimpaired. When, however, the [East Indies] Company and subsequently the Dutch Government took power, they did not continue the moderate suzerainty the princes had exercised in this law area, but adopted the despotism usual in the principalities themselves; our subsequent agrarian policy (i.e. the Land-rent system) of 1817 and the *Cultuurstelsel* [1] of Van den Bosch, made the crudest inroads into indigenous land rights, village organization and the authority of local leaders. (— —)

Jural communities

[*512*] Apart from the self-governing states of the past, to be discussed later, the only jural communities in this area are the territorial village and the self-constituted community (Indonesian company or association; Indonesian Christian parish). There is no trace, now or earlier, of higher or other jural groupings; the administrative 'regency' was never a jural community; indigenous water corporations are unknown; the Javanese or Madurese family is a kinship group lacking the practical cohesion or unity which in South Celebes and Bali keeps members of the family together even though it is no longer a discrete jural unit. The formation of villages (*désa*) in agrarian Java rarely led to the rise of cities, which was such a powerful factor in the development of mediaeval Europe. In the Javanese era only a few royal capitals (such as the former Majapait), or major ports (like Tuban and Gresik), were cities or comparable to cities, and they have since fallen into decay.

In spite of the Hindu term *désa* (in High-Javanese *dusun*; in

Madurese *dhisa* — cf. the Hindu term *nagari* among the Minangkabau) there is as little reason to doubt the Indonesian origin of the Javanese-Madurese village as there is to doubt the Indonesian origin of the Balinese village. The assumption that the municipal character of the village dates back only to the beginning of our administration (as stated in *Eindresumé* III:131) may be true of the *mancanegara* territories [the former outer provinces of the empire of Mataram] and Madura, where before 1831 and 1885 respectively, the Javanese sovereign government may have suppressed village autonomy, but for the rest this assumption is invalidated by the fact that the *dėsa* constitution is at all times and in every respect closely interwoven with family law and inheritance, land law, the law of chattels and the law of wrongs. It took a long time before the Javanese and Madurese *dėsa* was understood to any extent. Raffles, or rather Muntinghe,[2] 'discovered' it around 1813 in Java; but the initial measures relating to it (village electoral law, leasing of the village to [*513*] the village headman as a device for collecting land-rent) show the ignorance about it. Its agrarian position became known by the investigations of 1867-9 (*Eindresumé;* AB 14); its organizational structure and system of communal services through the *Eindresumé,* and the writings of Fokkens and Hasselman; its other characteristics as a result of miscellaneous contributions. The Government was bold enough to state (Bb. 6576 of 1906) that the *dėsa* held no more secrets for it.

As in Bali, ancient villages can be distinguished from modern. The great majority of the approximately 30-33,000 villages are still of the old type, comparable to the Acehnese *gampōng,* the Palembang *dusun* or the Minahasan *wanua:* that is, a territorial community of individual members the active interests of which are much wider than one would expect of a political unit. Despite four centuries of Islam, the traditional village still has its guardian spirit (*danyang dėsa*) housed in a tree. The village controls family interests as well as numerous matters concerning land and livestock (as is clearly reflected in the income of the village headman). The inhabitants often maintain common stock pens, granaries and rice nurseries. Compulsory mutual aid is not restricted to the interests of the village as such, but extends to the agricultural activities of the individual villagers and to the religious observances aimed at ensuring a good harvest. On the amalgamation of villages it is often stipulated that each should retain its guardian spirit and therefore the right to organize its own traditional

harvest meal (*sedekah bumi, sedekah dėsa*). As in South Sumatra, the young men are, or were, under the control of their own leader (*lurah* or *kepala sinoman;* in Madura, *sènoman*) and the girls sometimes under their *lurah kanoman,* for the carrying out of communal services. The corporate capacity of the village merges with that of the collectivity of its core-villagers (until the ordinance of 1906, and to some extent even thereafter). The village treasury, storage barns, bank and school are looked upon as western innovations; communal village lands, exploited for the benefit of the general village economy, seem to be unknown. The modern village, however, typified by the Christian village inaugurated by the reclamation of virgin land, has a village treasury from the start, and matters of family or estate are [*514*] less of a village concern; voluntary co-operation often replaces traditional mutual aid, and the village community is therefore usually — though not always — confined more or less to its official political functions.

The Javanese and Madurese villages differ in appearance. The Javanese village, often obscured by a dense hedge and trees, like an island surrounded by inundated fields, consists either of a single village (*dėsa*) or of a principal village (*krajan*) with subsidiary hamlets (*dukuh, pedukuhan, cantèlan*). A hamlet often has, or may acquire, its own boundaries (nowadays determined by the Administration), and may even be elevated to *dėsa* status by the splitting up of the parent village into two (how this took place under adat law is not reported). A new hamlet of the Javanese parent village retains the *danyang dėsa* or patron spirit of the latter (what happens after splitting up?); only independently established hamlets have their own *danyang.* Conversely, villages are nowadays often amalgamated, the original *dėsa* sometimes retaining a certain measure of independence; but it would appear that this process is sometimes carried out too hastily and artificially. The Madurese village, on the other hand, usually consists of a series of farmsteads, scattered or in small clusters, each with its own fields and livestock pens. It resembles a collectivity of farms, or of dispersed hamlets, rather than a local unity. It is only along the coast (for example near the saltings) and in the irrigated *sawah* complexes that the Madurese village, too, forms a contiguous whole.

The traditional significance of village territories in this law area is not only that of a sphere of political authority; it is above all the agrarian domain over which the village has a right of avail. This identity is, for instance, clearly revealed when it is reported from

Kediri and Probolinggo that a village boundary is determined by the answer to the question of how far the villagers may go into the forest to tap the *arén* trees. In case of doubt or dispute the boundary would be fixed by the village headmen concerned, together with their peoples. The name *bumi sataboné* is sometimes mentioned for the fields within this 'husk' of village wasteland. The information from Madura on this point is scanty. Even the defined territory of a hamlet in Java often has the character of a separate area of avail under the wider jurisdiction of the principal village (similar to the position in Karoland [*515*] and Palembang), there being specific information to this effect from old-Bagelen and Kediri. (—)

It was usual for village domains to adjoin in the densely populated centre of Java, but elsewhere intermediate tracts of land could be found over which no *désa* exercised a right of avail and it was especially on such strips in East Java that Madurese immigrants have founded many villages. In the *Eindresumé* (III:136) this no man's land is called *bumi gumantung* (pending or suspended land) or *bumi sroko*. On the one hand, our Administration, in addition to its understandable efforts to round off village territories neatly through exchanges of land, interfered most arbitrarily with the boundaries of village domains in the interests of the *Cultuurstelsel;* on the other, to make it possible to hold village headmen everywhere responsible for maintaining order, it apportioned all land in Java to one *désa* or another. Thus the vast no man's land of the Ijèn plateau was sometimes assigned to the little village of Licin at the foot of the mountain, and sometimes to Sumbercanting. (— —)

[*516*] The municipal villages in Java often have their common burial ground or grounds, shaded by *cempaka* or *semboja* trees, over which the village authority presumably exercises no more than administrative control. A few villages have also the grave of their founder, a hallowed place where harvest meals are held. If, by virtue of the right of avail, a village road or village green is made on individual land, adat-ownership of the land remains extant, though dormant; if made on unoccupied land it would also probably be regarded as being administered, but not owned by the village. The village courthouse (*balé désa*), fairly common in West Java where it is often found in the village square, is lacking in Madura and the rest of Java. But in Central and East Java villages have (or used to have) their sentry post (*gerdu, cakruk*) at the village gate; and often their Moslem house of worship or *langgar*. Like the *mönasah* in Aceh, this

appears to have been the village hall before the advent of Islam (16th century), which took it over. Even today the *langgar,* as well as being used for *sembahyang* [daily prayers] and Koranic instruction, serves as a guest-house and meeting place. In Madura, however, *langghar* seems to mean a kind of reception room, a raised open-fronted structure built on residential premises; but village prayer houses appear to be rare, except perhaps in the fishing villages. The name is reminiscent of the *langgara* or *langkara* of South Celebes (introduced by the Javanese?). The village school (*sekolah dêsa*), the village rice granary (*lumbung dêsa*) and the village bank (giving credit in rice or money) date from a later period. The term *lumbung miskin,* meaning 'paupers' barns', which were found here and there, is now commonly used for such rice barns belonging to Indonesian Christian parishes.

[*517*] It is worth noting further that, besides the rural villages of the interior, there are also the suburban villages or *kampong* in the principal towns, lying tucked away behind or between the main streets on which mostly Europeans live. Should such an urban village have agricultural land, it is again called a *dêsa* (—). Other types of municipal village without agricultural land are the fishing villages in Madura, in the Sidoarjo region, along the Segara Anakan [south coast of central Java] and elsewhere; or the saltmakers' villages in Madura.

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[*518*] Although there are no self-governing states left in this law area [the central Javanese principalities being treated as a separate law area], they have left too much of a mark on popular institutions to remain unmentioned (—). As far as the days of the Company and part of the 19th century are concerned — i.e. after the Hindu states of Tumapel and Majapait, and after the first Moslem coastal states of the 16th century, like Giri and Demak — three kinds of royal government must be distinguished: the powerful and truly Javanese empire of Mataram, the Balinese vassal state of Balambangan (Java's eastern corner), and the relatively younger little Madurese states.

Initially, the entire law area, excepting the present-day administrative districts of Pasuruan and Besuki, fell within the realm of Mataram (the present-day principalities of Yogyakarta and Surakarta). But here a distinction must be drawn. On the one hand, there were the outer provinces of the empire, consisting partly of the *pasisiran,* the maritime or 'beach' provinces of Pemalang, Demak, Pati, Tuban, Surabaya and the islands of Bawean and Madura, and partly of *mancanegara*

(external) territories: Banyumas, Madiun, Blitar. All these were under provincial governors, and were virtually unaffected by the royal apanage system (pp. 147, 165) which had such adverse effects upon the adat law. On the other hand, there was the imperial heartland, the *nagaragung,* comprising the present-day principalities together with the present-day district of Kedu (including Bagelen). The heartland territories were almost entirely allotted in apanage and governed from the capital (or the two capitals), though sometimes they seem to have been under resident provincial governors as well (—).

From this Mataramese territory the entire northern stretch of the *pasisiran* was sliced off first (1743) — old-Tegal, north Pekalongan, north Semarang, old-Japara, north Rembang, north Surabaya, Bawean — and as Company's territory ('Java's Nort-Eeast Coast', 1748-1806) placed under a Dutch governor at Semarang, though the Mataramese officialdom (provincial heads, etc.) and other indigenous institutions remained intact. Old-Kedu (part of the heartland) followed in 1812, its apanage system being abolished. The remainder of the *pasisiran* was lost in 1831 — south Pekalongan, south Semarang, south Rembang, south Surabaya — together with the *mancanegara* regions of [*519*] Banyumas, Madiun and Kediri; and also old-Bagelen, part of the heartland. Though we retained the Mataramese bureaucracy everywhere, we abolished the *nagaragung* apanage system in Kedu-Bagelen. It remains to be noted that, since the splitting of Mataram into Yogyakarta and Surakarta (Solo) in 1755 (to which the princedom Mangkunegaran was added in 1757, and the princedom Pakualaman in 1813), the *mancanegara* territories of Madiun and Kediri belong partly to Yogya and partly to Solo, and Banyumas almost entirely to Solo, as does most the heartland area Kedu-Bagelen. The 'Javanese era' of all these regions is often called *jaman kuna,* the 'olden times'.

The vassal state of Balambangan, comprising approximately the present districts of Pasuruan and Besuki, initially fell under Klungkung [Bali], later under Mataram (1639), and finally under no one. Around 1740 it lost part of its northern (*pasisiran*) fringe to the Company, and the remainder in 1767 and 1768. Little seems to be known of the government institutions under its *pangéran* ('prince') or *ratu Balambangan*; under Mataram it was systematically depopulated.

Finally, the three little Madurese states, that is, those of the *panembahan* of Madura (present-day Bangkalan with Sampang and Arosbaya), of Pamekasan, and of Sumenep. In the old days they constituted a single Mataramese province under a governor or *wedana*

Madura with three subordinate 'regents' (TBG, 1891:367). In the middle of the eighteenth century the regents became independent of both Mataram and the provincial governor. They were recognized by the Company and later by the colonial government as independent headmen, and even treated as minor sovereigns soon afterwards (—), but their royal institutions were, of course, largely derived from Mataram. Pamekasan was annexed in 1858, Sumenep in 1883, and finally, in 1885, Madura (Bangkalan-Sampang), thus bringing this entire law area under colonial rule. During this period of more than a century, therefore, the title 'Prince of Madura' did not mean the ruler of the entire island, but only of its western portion.

[*520*] Although, before 1743, the *pangéran* of the island of Bawean stood in the same relation to Mataram as did the provincial head of Madura he was never regarded as a sovereign by our government. With the annexation of Java's North-East Coast he became an ordinary *regent* (*bupati*) of the Government. When his family died out in 1869, the office itself was abolished.

Generally speaking it can be said that the benefit conferred by all these monarchies was their organization, above the level of village and village justice, of a higher Indonesian system of government and higher level of administration of justice, which was the more necessary because of the lack of village federations in Java and Madura. Their adverse effect lay in the destructive influence of Mataram upon the *désa* system and land rights in its heartland (the *nagaragung*), just as the little Madurese princedoms, though to a lesser extent, affected the system of land rights in their areas. The greater part of Central and East Java remained free of this particular evil. The fortuitous fact, however, that Raffles received so much of his information from the little princedom of Sumenep, and mistakenly regarded the central Javanese principalities as the heartland of pure Javanese adat law, had the result that we began to introduce into Central and East Java the very despotism from which these areas had been spared by Mataram itself. As far as Madura is concerned, evidence of royal despotism is found in the numerous emigrations to East Java, by which, besides those in search of work and material gain, also many landowners sought to escape from the sovereign's arbitrary power. In the outer provinces [*mancanegara*] of Mataram, especially in Banyumas and Madiun, the influence of the old princedoms is still apparent from the privileged or exempted villages which will be discussed below. Although, until 1812 and 1831, Kedu (Kedu-Bagelen) also belonged to the

apanage territory of the *nagaragung,* its village organization, though impaired, was not destroyed, for it flourished again after 1831. Also the popular law regarding land remained much more nearly intact than in the present-day principalities — although the term *gaduhan,* sometimes employed in Kedu for land in adat-ownership, probably points to a former Mataramese tenancy at will, as it would have been more likely for such lands to be called *milik* or *duwèn.*

Although in this law area, too, the royal absolutism of the Javanese era is plainly reflected in arbitrariness as regards village rights, landowners, compulsory services, etc., it is certainly not for us to pass [*521*] judgement. We may undoubtedly plead that our administrative actions and regulations — land-rent system, *cultuurstelsel,* forced labour and its aftermath, the fallacious agrarian measures of later date — were aimed not at personal gain but at economic welfare and the national interest. Nevertheless, this could mean little to the Indonesian whose rights were grossly infringed; and for far too much of the 19th century this national interest was not that of Indonesia, but of Holland.

The privileged or exempted villages (*dèsa perdikan, merdika, merdikan*) are of four different kinds, two of which really belong to an entirely different context. The villages of the *pekuncèn* (custodians of graves) are exempted only in the sense that taxes and services due to the sovereign are confined to the duty of maintaining and guarding a sacred grave; and the villages of the *mijèn* (privileged people) are under hereditary apanage granted to the representative of some privileged family, so that levies by this family took the place of levies by the sovereign. In other respects these two types of villages seem to be normal communities under normal village government.

The villages of the *pesantrèn* (religious seminaries) and those of the *keputihan* (pious men), were genuinely different. These two types owe their privileged existence to royal favour or generosity; they did not fall under the heads of the outer provinces or, as in the central territory of Kedu-Bagelen, under the officials of the capitals, but directly under the sovereign himself (nowadays under direct government administration?). They were exempted from all or most feudal services and levies. They are as much jural communities as is the ordinary *dèsa* (—).

With the *pesantrèn* villages — among them famous ones, though mostly now decayed, in the Panaraga area of Madiun and elsewhere — either a *dèsa* territory or a piece of no man's land was granted in adat-ownership by royal charter (*piyagem*) to a particular person and his descendants for the purpose of maintaining a religious seminary.

The headman of such a village is a landowner and tax collector for [522] his own benefit (—). It should be remembered that the upkeep of seminaries in this area can also be achieved by entirely different means. The numerous schools of Surabaya and Madura, as well as the more recently established ones in Kedu, subsist on their own income, including religious levies (*pitrah*), agricultural earnings of the students and charitable gifts, and the villages in which they are situated are ordinary *dėsa* communities.

The 'pious' villages (*dėsa keputihan, putihan* or *mutihan*) are very similar to the *biböëh* or *wakööëh* villages in Aceh. They were exempted from certain taxes by the sovereign — or by longstanding usage? — because the presence of certain pious men (*wong putihan,* 'white' people; as against *wong abangan,* 'red' or impious people) meant that religious services and many other religious duties were observed much more faithfull there than elsewhere. In places like old-Bagelen these villages are numerous. In 1916 it was said they were about to be abolished. It is obvious that a village is not exempted merely because it is occupied by mosque personnel (*dėsa pekauman, kauman*) whose position frees them from compulsory services. (—)

Because there is no longer any question of self-governing states in this law area, the only indigenous jural communities, besides villages, are the self-constituted business associations, societies and Christian parishes. They are the more important because in Java, too, there has been an awakening of organized Indonesian activity in the 20th century — in economics, politics and labour organizations — and because the Christian communities are tending to emancipate themselves from European tutelage. So far, for want of anything better, many associations follow the European pattern, but many others are created without any predetermined pattern in customary fashion, the members accepting their new legal obligations through the payment of a bond [523] sum (*panjer*). What is needed, if associations are to flourish as they do on Bali, is an individualistic outlook, which is still lacking, particularly in Central Java; a keen commercial sense; and finally, a few simple but practicable models and rules for associational life.

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Individuals

[524] At the time of the former monarchical governments in Madura and in the Javanese portion of this law area, the most important social classes comprised the sovereigns, princes (*arya, sentana*) and high state officials or *priyayi* (in High-Javanese: *priyantun*). Even after the

annexation, the class of royalty and of *priyayi* remained, and until recently *priyayi* registers were being kept.

The Madurese attitude towards higher classes is far more easygoing than that of the Javanese. In Central Java one may hear *sentana* used for nobility, and *kèntolan* for people of good family, but with a few exceptions they do not seem to be distinguished from commoners. There is scarcely an Indonesian middle class; after the higher classes one comes down to the ordinary, impecunious villager, the *wong cilik* ('little man'), *wong wijah* ('common man'), or their principal category, *wong tani* (peasant). The few well-to-do Indonesians outside the *priyayi* class are usually denigrated by such predicates as *haji,* usurer, or *haji*-usurer. Yet one cannot speak of a *haji* class, even though the Government used ignorantly to give privileges to them. The few slaves found in this law area until 1860 — even later in Madura? — were domestic and not plantation slaves.

Far more important for the daily life of the village, and a key to the adat law of Java, is the typical Indonesian classification of the *dèsa* inhabitants into three groups of villagers. First, those who have belonged to the village from its beginning, the core-villagers, married, having a homestead and fields, and enjoying full [525] rights and duties in the village. They are called *wong baku* ('stock', 'stock-member'), *wong ajeg* ('regular man'), *wong* (*orèng*) * *kenceng* ('tight man') *wong ngayah* ('toiling man'), *orèng pengaje, kraman, gogol* ('crowbar'); and later, when labour for the sovereign or government became their hardest liability, also *sikep* ('serviceman') or *sikep ngarep* ('leading serviceman'), *kuli kerig, somahan kuwat, kuli baku, kuli ajeg* and even simply *kuli.* The *Eindresumé* correctly defines this class variously as 'descendants of the first settlers', 'persons originating from the *dèsa*', 'well-to-do persons', 'the well-to-do peasant class constituting the core of the population: the landowners of the village'. Occasionally women are mentioned as core-villagers (a widow on behalf of her sons?); normally core-villager status devolves from father to son or other male descendant.

In the second rank are the secondary residents or people without arable land of their own. Either they have their own residential plot (*lindung, wong ngindung,* plot holder; or wrong *kendo,* 'loose' people; or *budi, budiyan,* share-croppers; or specifically *orèng paroan, teloan,* half-sharers, third-sharers; later *kuli ngendo);* or they have a house

* [*Wong* is Javanese, *orèng* Madurese, for 'man' or 'people'.]

of their own on another's plot (*wong dèmpèl, mondok tèmpèl* or *dèmpèl,* 'attached people', *mondok karang* or *pekarangan, numpang bumi, dunung omah*). Such secondary residents, who may or may not be related by blood to core-villagers, have only a half-share in village rights and duties, and therefore sometimes came to be called *sikep cilik* ('little' *sikep*) or *sikep buri* ('rear' *sikep*).

Finally, there are the dependants and hangers-on: married or unmarried children, sons-in-law, wives, paid farmhands (*bujang*), an old father or mother living with his or her son, and so on. They are called *rayat* [dependants, subjects], *dunung nusup, dunung mondok, mondok glongsor, rangkepan* ('lining'), *juru sawah* [farmhand], *numpang belaka;* in Madura *orèng kendo.* Married hangers-on having their own family room (*gandok*) under a common roof (*èmpèr*) are called *mondok selusup* ('splinter folk'), *mondok slosor* ('inserted folk'), *mondok ringkuk* or *ringkel* or *sumpel* [self-providing lodgers]. In view of their exemption from compulsory services (at least from the principal services, but not always from auxiliary duties), this group came to be called *angguran.* Like the *anak samang* of Minangkabau they have virtually no rights and duties. Secondary residents and lodgers together, or (elsewhere) either of these classes, are often called [526] *wong numpang* and *orèng nompeng* (not *menumpang*), 'stacked people'.

Here it should be noted that although our government policy of the last century has been one of continuous confusion and disruption of these class distinctions (the unbearable weight of our land-rent system and compulsory cultivation and other services made the people themselves efface their adat distinctions in an attempt to distribute the burden over many more shoulders), this classification can still be clearly recognized as the basis of the traditional *désa* rights and duties (—).

The scheme outlined here still needs to be expanded a little. With regard to rights and duties the owners of dry fields (*tegal*) are sometimes included in the second class of villagers, as well as divorced or widowed men (*dubo*) without a grown-up daughter in the house, and the aged but able-bodied (*jempo* or *jomo kenceng, tepo, buh;* in Bawean, *rèpoh*). The newly-wed (*kemantèn anyar*) and newcomers, as well as the aged and infirm (*jempo réto, jimpèn*), belong to the second and third class. The newly-wed and newcomers who at first are tax-exempt, are sometimes called *wong anyar* [new people], *wong sengkan, kempitan* ('those carried under the arm'; children in arms?),

telepèh or — later — *kuli sigaran* ('split' *kuli,* i.e. with divided duties), *kuli gotong.*

The order of rank then becomes: (*a*) core-villagers owning wet fields; (*b*) owners of dry fields, (*c*) hangers-on, children-at-home, newly-wed, newcomers and invalids.

People pursuing an occupation other than agriculture, like fishermen, traders or owners of beach fish-ponds, are sometimes called *magang.* Whether they belong to the first class depends on whether they form the core of the village population, as they would for instance in a fishing village or beach-pond village.

To be sixteen or so and still unmarried (—) is thought to be [527] disgraceful for girls and boys alike and is therefore rare. The unmarried, being regarded as minors, belong to the third class of villagers. The generic term for young bachelors is *sinoman, kanoman, jaka, perjaka;* on Madura and Kangean and in Banyuwangi *lancèng;* on Bawean *perjakha.* The use of the old village hall, *langgar,* as a dormitory for young men is not a Javanese custom. As in Bali, widowed and divorced men who do not remarry have none or only some of the rights and duties of villagers. Several Christian villages, therefore, have regulations obliging them to remarry within a certain period, on pain of losing their share in the village lands, that is the privileges of village membership. (—)

There is, in all probability, a correlation between this social classification and another important feature of the village constitution. Since it is the married core-villager, owner of both residential and arable land, who participates fully in all the village rights and duties, there is only one gracious escape for him when he feels himself growing too old for his duties: to transfer his land to his heirs during his lifetime (—). A man who voluntarily — or through being widowed? — steps down after having been a first-class villager is thereafter — and this is the crucial point — counted among the village elders (*marakaki, merkaki, pancakaki, tuwa tuwa, kamituwa, winituwa, pinituwa, wong tuwa dèsa*). Their important role as disinterested [528] experts on village affairs and constant advisers to the village authority (also in Madura?) will be discussed shortly.

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[529] Every person in Java and Madura (formerly even the slaves) had and has legal capacity, the eligibility for rights and duties. Besides natural persons and jural communities, however, there are also 'institutions' which are the bearers of rights and obligations. As in Bali

and Lombok, where land and movable property may 'belong to' a temple, there are also in this law area mosque lands, movable mosque property, mosque treasuries, or property belonging to religious schools (*pesantrèn*), representing a much broader conception than that of *wakap* (consecrated) land and movables with which a mosque or religious school has been endowed; in West Java such lands and movables, about which nothing is known with certainty, would presumably be *wakap*.

Because of the bilateral kinship system a married woman's capacity to transact is here equal to and as unrestricted as that of a married man — the application of our Civil Code to the Javanese or Madurese woman would only impair her position. Parents act on behalf of their young children — child betrothals and marriages come to mind. Full legal majority for older children seems to depend on whether they have left the parental home. Consequently they do not attain majority upon marrying if they continue to live in with the parents of one of them. Discrimination against unbelievers (*pasèk*), for instance with regard to the giving of evidence, applies only in Moslem courts.

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[*Village Government*]

[*530*] An unexpected feature is immediately apparent in the administration of the Javanese and Madurese village. In this law area the collectivity of core-villagers, or of core-villagers and secondary residents, asserts itself far less prominently than in the older, or even the younger, villages of Bali. There are, admittedly, reports of annual *désa* meetings (*kekumpulan labuh,* 'the meeting of the beginning of the rains' — *Eindresumé* III:101, 193, 238), for the annual arrangement of mutual aid in *désa* services, for the application of the village right of avail, and for other village interests (meetings which in the past helped to spread the idea in administrative circles that all arable lands were redistributed every year in every village). But such meetings are of course entirely different from the regular meetings of the members of the Balinese *désa* association. In Central and East Java and in Madura the village is and was primarily governed by the village headman or municipal head [*petinggi, bekel, lurah,* etc.]. Village assemblies to discuss important matters, as prescribed by the 1906 municipal ordinance, must therefore often have been an innovation, or else remained a dead letter. But here, too, the villagers still have the traditional, retroactive right to complain (*anggogol*) by going in pro-

cession to a higher authority, a right of mass protest which persists in the principalities and in processions to *priyayi* and district officers (processions to the civil commissioner, however, are punishable under the police regulations of 1872, which show no understanding whatever for this genuine form of democracy).

There are, however, two important constraints on the one-man character of *désa* government. First, the village of municipal headman in Central and East Java (and Madura?) regularly consults with the retired core-villagers — the previously-mentioned elders — either with all of them or, as other information would indicate, with a few (selected by himself?). But it is explicitly stated that these elders do not and did not act as a miniature parliament in relation to the village authority (*Eindresumé* III:235, 238).

Secondly, the adjudication of village disputes, at any rate those of an agrarian nature, has always been in the hands of these elders and not of the headman. For one thing, in accordance with the right of avail of the village it was these elders who surveyed and distributed the rice fields and allocated the use of water, with the result that they were better informed than any one else when it came to settling agrarian disputes; for another, they were less partial than the active core-villagers who themselves owned arable land. In a large part of this law area these elders are also said to advise on the distribution of deceased estates. (—)

[532] In contrast with the role of the elders, the circumstance that the headman also has fellow-members in the village administration may hardly be said to limit his power. For the latter, quite unlike their counterparts in the old Balinese *désa,* are merely his dependent henchmen. In a small village and sometimes even in a large one they are often his kinsmen. Everywhere they are charged with certain duties: to substitute and deputize for the headman, to notify people (including the headmen of subordinate hamlets) of his decisions and to run errands; to take care of matters to do with irrigation, forestry, live-stock, registers, religion (Islamic, sometimes Christian), policing (e.g. compliance with *désa* services), and so on. One must not think that there is one dignitary for each function. On the contrary, in large villages or in villages with people of widely divergent occupational standing (e.g. peasants alongside merchants or craftsmen), there could be as many as a dozen dignitaries for one function; while in small villages one man will often be responsible for two or more functions. On the other hand, it seems that deputizing for the headman is

almost always the duty of a particular person; also the care of Islamic affairs is a responsibility never assumed by the headman himself.

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[536] Is it traditional for village headmen in Java to be freely elected by their villagers? This seems improbable merely in view of the large numbers of villages in which, at the time of the enquiry of 1868, the headman was descended from the founding family, a situation which is the rule in the exempted *désa.* Until the present day the headman in many villages has been related to his predecessor (e.g. AB II:198; XIV:77). The many appointments in former days of a minor represented by a temporary caretaker, are also incompatible with the idea of free elections; moreover the term *lotteri,* which occurs in Banyumas as well as in Palembang, indicates an importation, something felt to be of European origin and un-Indonesian. In fact, free elections in western style were non-existent, not only in the outer provinces, but also in Madura at the time of the princes, and in the Javanese principalities. Many Javanese in 1868 still remembered their introduction; the way they were applied bore no resemblance to democracy. The questionable value of Raffles' data of 1812 on the free franchise in the vicinity of the town of Surabaya has been stressed by Hasselman (1901:204-5), Van der Kemp (1916:362-3) and others.

On the other hand, it is difficult to believe in an automatic hereditary succession to the office of headman in view of the frequent manifestations of popular will, and of the fact that the successor may be a son, son-in-law, brother or nephew. Presumably, therefore, the [537] adat formula regarding appointments is the same as the prescription in section 16 of the Ordinance of 1907 for elections in exempted villages: the incumbents to be elected 'as far as possible with due regard to the principle of hereditary succession'. Such successions, based on 'inheritance plus election' — i.e. not strictly hereditary but a permanent exercise of a function by a particular family from which a representative is elected from time to time — occurs in many parts of Sumatra, Borneo, the Moluccas, Timor, Bali and Lombok. This power of election probably used to rest with the villagers. From Japara and Sidayu it is even reported that there had to be unanimity on the appointment, an indication that in those days the idea of a majority outvoting a minority was unknown. It probably used to be a condition for electors — that is, men only? — to be core-villagers, although in later years mention is made of many other 'electors', even

jaka [unmarried men] (—). It does not appear to have been essential for the headman-elect to be a core-villager at the time of his election, though it was certainly general practice. One frequently reads of a man, and sometimes a woman, acting as head of the village on behalf of his immature relative, or of her immature son or grandson. One also reads of village head-women (e.g. *Eindresumé* III:281), who in that case arrange for their office to be performed by a paid substitute.

The headman himself — at some places in consultation with the village elders, or the core-villagers, or with the more prominent of his henchmen — would choose new assistants from among the core-villagers, and often from his own family, the latter choice being motivated by the consideration that in a subsequent election for the headship there should be sufficiently experienced candidates available among his relatives. Only in respect of village scribes and religious functionaries does one sometimes read of the recruitment of outsiders. As long as the heads of subordinate hamlets are nothing but henchmen [538] of the *dêsa* headman, this rule also applies to them; once they achieve independence their office likewise becomes subject to the principle of inheritance-plus-election. (—)

To understand the remuneration of village officials it is necessary first to understand the system of *dêsa* revenue. This is important, because the Mataramese administration, and later our own, used this system for their own purpose.

Productive village property is, or was until recently, uncommon. Village funds to yield interest (bank savings accounts, etc.) are of very recent date, and seem to have been introduced first in Christian villages. Landed property reclaimed at the instance of the village community is usually parcelled out soon after reclamation, and only rarely (e.g. in Pasuruan) does one read of village land, i.e. land genuinely owned by the village community, being given out for rent or for share-cropping. Everywhere the village receives recognition dues (*mesi, pamesi*) from outsiders who cultivate its land. That is about all. Village treasuries did not exist — perhaps just as well in the old days.

As regards other forms of village revenue, we westerners naturally think first of taxes in kind or money. Such compulsory contributions did indeed exist as part of the system of compulsory mutual aid which will be discussed later (—). Called *urunan,* they were for such things as harvest festivals, village prayer houses, and headmen's houses. It is very rare to read of proper municipal taxes (mostly in fishing villages

and urban wards?). The *wang bècèr* (incidental levies) and the tax on residential plots (*pengawangawang*), of which there is an occasional report, may be in this category. The tax-payers were the core-villagers (at least, only they were fully liable), but in a few villages privileged by Mataram, tolls used to be exacted from all strangers passing through the *lawang sekètèng* ('one-penny-gate').

Far more important, however, is the institution of village service, levied for all possible village purposes and likewise conceived as a form of mutual aid. It includes the maintenance of *désa* roads, sentry [539] posts, fences and irrigation works, and rendering guard duties and regular and casual services to the headman and his assistants. As indicated earlier, the basis on which regular services are required (reflected also in the regulations for compulsory cultivation imposed by our Administration) is that elderly core-villagers had a limited liability, ordinary core-villagers a full liability, while newcomers and the newly-wed go from exemption to full liability in the course of a few years. Persons exempt from normal village services were called *wong angguran* (or *pemanggur*), 'idlers'. Villagers of the second class are only occasionally liable for auxiliary service, and then only within the residential part of the village, while dependants or lodgers have no personal liability. The adage, that village service is founded upon land, is therefore true in the sense that it is the core-villagers, normally the only permanent land owners, upon whom such service rests. There is no indication, however, that their burdens are proportionate to the size of their holdings.

These basic principles are modified in two ways. First, in an emergency there can be a general call-up (*gugur gunung*, 'landslide' — symbol of an act of God?), for which not only the core-villagers (who can also enlist the help of their dependants) but also second-class villagers are liable. Secondly, for some services there is an economically sound system of specialization, organized to distribute the normal burden more or less equally over the various categories of villager. Certain groups of people would thus be responsible for cutting wood and doing carpentry (*blandong*), and others for road maintenance, sentry duty, postal delivery, service to headmen, or provision of *gamelan* music. Each group had its own foreman or *lurah*. Likewise, the preparation and staging of *désa* feasts (and, sometimes, escorting the headman on his travels) were for the bachelors' group (*sinoman, kanoman*) under its own foreman. Thus, while the main rule is that all core-villagers take part in all *désa* duties, the subsidiary rule is that

certain tasks are the responsibility of specific groups of villagers, with the remaining chores being done by the rest of the villagers.

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[*540*] One would, however, completely misunderstand the nature of these *désa* duties and of the headman's revenue if one thought them to be confined to the tasks enumerated above. Unlike our municipal rates, *désa* levies and services are not isolated obligations; they are simply an aspect of a general obligation of communal aid which adat law imposes upon all villagers of full status whenever village interests are involved. And 'village interests' are more extensive than westerners would expect. As in Aceh and other places, they include marriage and divorce, deceased estates, sale and pledging of livestock (involvement in transactions in cultivable land are a consequence of the village right of avail), hunting down wild boars and destructive rodents when necessary (—), recruiting labour for the rice harvest, organizing harvest feasts and other ritual meals for the villagers' benefit, arranging the proper distribution of water, supervising of herd boys, caring for orphans. Hence, when through an abuse of power by a local *bupati* or a government official, one or two villagers had been unfairly hit by an excessive demand for horses or other goods, it was discovered afterwards that the whole *désa* community had helped them. Likewise, when newcomers are accepted by the *désa,* it is the *désa*'s responsibility to provide them with a residential site, even if this meant some sacrifice [*541*] for the existing inhabitants. A man who slaughters livestock in the village will therefore take a piece to the headman as a token of respect.

Adat law can only be understood if this strongly communal element in Javanese-Madurese life is constantly kept in mind. It is not seen only in the remarkable powers which village authorities derive from the village right of avail, and which they exercise in land sales, in tenancies in return for loan (sometimes even in letting and share-cropping transactions), in requisitioning land for indeterminate periods in the village interest, and in allocating vacated land to newcomers. It underlies such customary forms of co-operation as are expressed in the collective ownership of cattle kraals (—) or of rice barns, or in the collective building and maintenance of waterworks. If adat law can dispense with hereditary servitudes, if a person can own or be the pledgee of a plantation on another's land without being expressly entitled to enter upon that land, if irrigation law needs no elaborate regulations, guardianship no fixed rules, and inheritance no automati-

cally applicable prescriptions, then the reason is that rights are not interpreted and exercised after the manner of Roman law, which makes individual interest predominate, but that the enjoyment of private property is subject to community interests. All this is particularly clearly reflected in the revenue of the village headman. He who reads about the sources of the headman's income in Hasselman's report on *dėsa* services (1905) will recognize in the perquisites there enumerated all these forms of village involvement. (—) Western shortsightedness, however, leapt to the conclusion that this was extortion.

Special mention must be made of the fields for office holders, which occur everywhere in this law area. They are not apanage (i.e. the privilege of receiving revenue in the sovereign's place without having a right in the land itself), but cultivable fields to which the holder of an office is entitled by virtue of his office, and to the cultivation of which the villagers are usually obliged to contribute. Two kinds are [*542*] reported. A headman may reclaim virgin land by enlisting the collective assistance (*dėsa* service) of his villagers, and thus acquire an official field (*sawah petinggèn* or *bekelan*) the transfer of which to his successor seems to be secure only if the latter is his relative. It is also possible for a piece of vacated rice land (*gantungan, playangan, pikulan*) to be allocated to the headman or an assistant of his so that he enjoys a restricted adat-ownership while in office. Our Government understands the latter type of official field (*caton* in Madura; *bengkok* in Java) to be village property over which the functionary has only a right of use. Fish ponds, too, may be held in this manner. A headman (or assistant) might have such properties both in his principal village and in a hamlet having its own area of avail. Official fields were exempt from royal taxes, *pajeg* (—). Moreover, the village headman was exempt from royal tributory services and sometimes shared the sovereign's *pajeg*.

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Law of Kinship

[*566*] Relatives in Central and East Java and Madura comprise three categories of people: first, those who according to the principles of bilateral descent [3] derive from a common ancestor or ancestress, but excluding those adopted by outsiders; secondly, the spouses of these consanguinious relatives together with their kindred; and thirdly, those adopted by any of these relatives. Concubines or kept women fall outside the second category, but children born out of wedlock by such

women come within the first category without any recognition from either father's or mother's side being necessary (semi-legitimate children; on Bawean, *jodo*). On the other hand, the children of purely temporary or casual liaisons — thus only a small portion of the children born out of wedlock — are related only to their mother and her kindred (illegitimate children or *jadah, haram jadah*). Semi-legitimate children are hardly ever found nowadays, for illegitimacy is either avoided by a temporary marriage to the concubine — this was the traditional way — or the child is given a fictitious father before its birth (sometimes in return for money).

The principles of bilateral descent prevailing in this law area not only apply equally to the rest of Java, but are the rule in the greater part of the regions outside Java.

For direct descendants on both sides the Javanese use the term *anak* [567] (child), *putu* or *cucuk* (grandchild), *buyut* (great-grandchild), *canggah* (great-great-grandchild), *warèng, udeg-udeg, gantungsiwur,* and *grepak.* In addition, there are names not only for all kinds of ascendants (often the same as those for descendants), but also for an older brother and his children, a younger one and his children, and so forth.

As according to the principles of bilateral descent married people remain part of their natal kingroup, marriage merely adds another kindred to one's own. Madurese spouses are called each other's 'made kinsman', *bhalangkep.* In Java, parents on each side are called each other's *bésan* (in Madura *bhisan*), but this does not count as real kinship. Though the distinction between principal and lesser wives is of consequence for dynastic successions in the Javanese principalities, it does not affect the law of kinship itself. It is different (also on Madura) with concubinage among the nobility (*ampéyan, selir, gundik*), for it is not uncommon for a *priyayi* to have up to four wives under Moslem law and to sustain regular commerce with one or more women of a lower class whom he does not intend to marry. This situation should be clearly distinguished from that of a noble who, on the quiet and often without the knowledge of his high-born wife or wives, actually marries a wife of lowly status (*selir kawin, garwa selir*). Living with a *selir* without marrying her is not shameful according to the indigenous way of thinking. The *selir* usually lives in a separate dwelling, occasionally in an annex on the husband's residential plot, and naturally does not enjoy the jural equality which this kinship system confers upon a married woman. Because semi-legitimate children are at a disadvantage in matters of inheritance and nobility, a con-

cubine about to give birth was sometimes made a wife (*selir tabon*) by means of a marriage ceremony, only to be repudiated after her confinement. To do this, a *priyayi* or other nobleman with a full complement of four wives would repudiate one of them temporarily by the purchased repudiation called *kuluk,* thus avoiding problems of revocation, and enabling him to remarry the repudiated wife again [*568*] afterwards (see Snouck Hurgronje, 1906, I:369f.). The keeping of concubines is opposed by Javanese Christianity and by the even more recent force of Sarékat Islam, but the practice is encouraged whenever a missionary refuses, for reasons which the Christian Indonesian does not consider convincing, to solemnize a coveted marriage or to help dissolve a hated one. Living together with a concubine is said to be rare among Christian Indonesians, and is sometimes a ground for expulsion from the mission community.

The body of kin is also enlarged by adoption, though by the same token another body of kin is reduced. Adoption is widespread among both Christians and Moslems, and is called *amèk* (High-Javanese: *mendet, mundut;* Madurese: *ngalaq* etc.; an adopted child is called *pèkpèkan, anak pupon, anak mas.* Adoption must in theory be sharply distinguished from the fostering of a child, *anak kukupan,* an action without legal consequences, but since no outward formality attaches to it — unlike legal adoption among the Gayo, Dayak, Tonsawang and perhaps Balinese — it therefore takes place through the actual fact of continuous care of a child and it is wellnigh impossible for a court to know which category of child it has before it. If this absence of formality were merely a result of Islam, whose law and religious judges forbid adoption, there would perhaps be a reason for the missions to attempt to introduce an Indonesian conceived form of adoption among Christian Indonesians; but even among the pagan Tenggerese no formal adoption has been discovered. Adoption can be by childless people, but does not seem to be forbidden to those with children, and a married person probably needs his or her spouse's consent. Legally the adopted child is virtually equal to the adopter's own children as regards the law of marriage and inheritance. Hence, boys would be adopted usually for their free labour, and girls more for the income from their marriage, than for the addition of offspring or for charitable reasons. The adat law of the Christian Indonesians has rightly upheld this resilient institution, though it is condemned by Islam.

[*569*] The institution of adoption, which has never been investigated

in this law area, still presents many uncertainties. According to some, adopted children are equal with fully legitimate offspring; according to others, they are like step-children. It is also uncertain whether — as sometimes appears to happen — more than one child, or an adult, including a married person, may be adopted; whether there must be some kinship connexion or a certain age difference between adopted and adopter; whether also the widowed or the unmarried may adopt; whether an adopted person may be passed on to another adopter (improbable); and whether adoptions may be revoked. The permission of the real parents, if they are known and still alive, is probably necessary, but in what form? And do any family ties or inheritance rights remain between the adopted person and his or her original kinship group? (—) The village or family do not seem to be involved in matters of adoption. Since adoption is so common in Java, it should not be too difficult to ascertain the prevailing practices.

In this law area, too, the principles of jural equality leave no room for adoptive marriages.

As the family here is neither a jural community nor a closely-knit kinship group, expulsion from it is unknown. Family involvement in marriage and inheritance consequently means the participation of the immediate kindred. Succession on the basis of heredity-plus-election — which in other areas often indicates that an office is vested in a particular [unilineal] family — therefore means here no more than the right of one of a person's close relatives to succeed to this vacant office. Kindred or *wangsa* are usually limited to the third or fourth generation descendants of one man or woman. Family ties are reinforced among other things by the honouring of deceased parents or grandparents, to whose graves people go for example to ask 'consent' to proceed with important transactions (cf. Snouck Hurgronje 1906, I:432). Children also address the brothers of their father and the sisters of their mother as 'father' and 'mother'. As elsewhere in Indonesia, family (or sur-)names in our sense are still unusual. But it is customary among high-class Javanese to make the names within a nuclear family similar to each other, like Kartini, Kertono, and Karlini, or — in the [*570*] case of distinguished, double-barrelled names — Wiryodijoyo and Wiryosudarmo, or Suryondoyo, Suryokumoro and Suryodarwono. And if — as is the rule in West Java but the exception here — this similarity is contained in the latter part of the name (Atmodiwiryo, Wongsodiwiryo), there is some resemblance to our surnames. The attempt to introduce Christian and family names among Christian

Indonesians — already to some extent the fashion in East Java — can only add fuel to the belief that becoming a Christian means becoming westernized; and it would be an even worse aberration if they were to be afflicted with family names or parts of names in Dutch style — such as Van Deventer's inexplicable recommendation in 1913, that Javanese, depending on their legal status, be named after Javanese place names with locative prefixes similar to 'Van' or 'Ter' in Dutch usage (—). *Priyayi* upon assuming office often adopt a name of their own making similar to that of their father, which may again result in something like a family name.

While married people in the lower class often prefix their own name by Pak or Bok as soon as children are born, other parents call themselves after their first child: so if the child is called Kamirah, the father becomes Pak Kamirah and the mother Bok Kamirah, and this appellation (*karan anak*) can survive even the death of the child. Thereafter, people sometimes change their names to avoid bad fortune, or when they become a *priyayi* or village headman (—), and so on. Though this change of names is rare among Christian Indonesians — excepting, alas, at baptism itself — calling themselves after a child is still deeply rooted even among them.

The organization of a population register for the indigenous population can only succeed if it is done in accordance with eastern nomenclature.

Law of Marriage

[*571*] The law of marriage in this law area is made up of a combination of jural equality deriving from bilateral kinship, eleutherogamy,* and the formal requirements of Islam. The usual characteristics of the marriage are: it is contracted between two parties of equal standing; during the marriage husband and wife are personally and materially on an equal footing, and they can terminate it singly or together. In the course of time the picture has sometimes become difficult to recognize, because Islam and Christianity have influenced and distorted it. Moreover, contemporary research poses the question of whether matrilineal or patrilineal elements survive in the marriage of today.

Among both Moslems and Christians the marriage is initiated by the proposal of the young man, or actually of his parents who arrange all

* [Van Vollenhoven coinage, 'freedom of marriage'.]

marriage affairs. Here, too, the proposal is made through go-betweens, *congkok* (on Bawean, however, through the father and the village headman); it is accompanied by gifts (*sekket batton* in Madura, *sanggan* in Java) and addressed to the girl's parents (not only to her father) or to the person customarily acting on their behalf (eldest brother, etc.). Once agreement is reached there is a legally binding betrothal, based not on bare consensus but on consensus accompanied by a visible token. In Java this is a betrothal present or pledge, *peningset* ('means of tying up something'), *tengeran, pemanjer,* which is given by the young man to the girl herself (not her parents) and which usually remains hers after the conclusion of the marriage, though it may sometimes be given back upon the payment of the *mas kawin* [marriage gift]. On Madura, [references to] *lamaran* as against *tongngebbhan,* or *pamoghi* as against *lancengan,* seem to point to an exchange of such betrothal gifts, but the information is far from clear. Among Christian Indonesians the betrothal must often be announced in church (as soon as it is binding, or near the time of marriage?). The betrothal, being a matter between the respective parents in which the element of affection usually remains in the background, does not lead to a closer acquaintance between the young couple; but it does have legal consequences, [572] namely that the woman, if she fails to fulfil her promise of marriage, must return the *peningset* to the man (and hence may not alienate it before the wedding?), that the man forfeits his gift if he fails to fulfil his promise, and that all wrongs against a betrothed girl's virtue are equated with those committed against a married woman (a commendable adat rule of which the Criminal Code of 1915 fails to take account) (—). Betrothal therefore does not involve the compulsion to marry. The *peningset,* though given by the party (i.e. the man) who initiates the transaction, binds not only the party he seeks to bind, but himself as well. A further application of the rule concerning non-fulfilment on the part of the woman seems to be the information from Madura that the man may break off the betrothal (and, hence, receive back his betrothal gift?) if, before the marriage, the two women who customarily examine betrothed girls declare her to be no longer virgin. Betrothals usually last only a few weeks or months, but on Kangean they may last for years, and among Christians, too, they tend to be long. Betrothed persons are called *pacangan* or *tagon,* on Kangean *bakalan.* Apart from unfaithfulness by either party (with the consequences mentioned above), a betrothal could be broken off, after mutual consultations by the respective parents, upon the

voluntary return of the *peningset* by the girl and the acceptance of it by the man. Should one of them refuse, they would remain bound, but owing to the lack of sanction — neither the 'council of priests' nor the *landraad* court being particularly concerned about the betrothal gift — both the offer to return the gift and the acceptance or refusal of it seem to have become rare nowadays. The information available does not reveal what changes in betrothal customs take place with second or subsequent marriages.

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[573] Unlike such areas as the Minahasa, where, even though there are no specific rules of preference, endogamy or exogamy, marriages outside a particular kin-group are considered undesirable and are therefore rare, in this law area marriage is largely free from kinship ties. There are, however, three kinds of restriction. First, there are prohibited degrees of relationship, often up to the fourth degree — brothers and sisters, and so on — but these vary locally and therefore do not coincide with the precise prohibitions of Islamic law. Sometimes marriage between full cousins is prohibited because it is considered to lead to *rusuh* (disorder) — though deviations can be rectified, for instance through the prescribed 'wrestling contest' (*ila-ila glempeng*) between the two fathers. Elsewhere such marriages are actually preferred, even among Christians, but prohibited between full cousins' children. Secondly, everywhere the marriage of an elder sister takes precedence over that of a younger sister. And, finally, there is the prohibition on two siblings marrying into the same family, for this would create a double relationship-in-law between their parents (*bésan*) and similar complications. But there are ways of circumventing these rules in order to marry whomsoever one wishes, provided certain other prescriptive rules are observed. These other rules are not the same for Moslems and Christians. Protestant adat law — sometimes the product of spontaneous growth, sometimes of deliberations by the church council or the people themselves, or sometimes of a missionary's decision — insists on free consent of the parties, though Javanese nature often proves to be stronger than doctrine. Although Moslem law, too, gives priority to free consent (p. 82), it contains a far-reaching exception: on the one hand the control the father or father's father has over a virgin of any age; on the other the control any blood *wali* has over a boy under age. In practice, first marriages and first betrothals are still arranged by the respective parents in accordance with their own wishes, but on Kangean, it is said, the girl has a

[574] greater say in the matter. After western fashion, but consonant with this attitude, the Protestant mission requires the consent of the parents or acting parents at the conclusion of a first marriage, but their refusal may be superseded by the consent of the full church council. While a Moslem may have up to four wives (one is the norm among common folk), Catholics and Protestants may have only one. A polygamously married Moslem in Java who becomes a Christian convert is no longer required first to repudiate the extra wife or wives. A Moslem may not marry a woman until the expiry of the *iddah* period (about a hundred days) after the dissolution of her marriage through death or divorce or following upon her confinement if she happened to be pregnant at the time her marriage was dissolved. A similar but more restrictive rule, prohibiting the remarriage of a Protestant woman within approximately three hundred days, is unfortunately derived from European law. The circumstance that two marriage candidates had been married to each other before is not an impediment to a new marriage between them, even if it was the woman's adultery that had led to the dissolution of their first marriage; and under Islamic law, it is an impediment only if there has been a threefold repudiation not followed by a subsequent marriage to another (p. 82). And if, as formerly in East Java, representatives of the Protestant church will not remarry former spouses (Deuteronomy 24, Jeremiah 3), this usually only results in concubinage, with all its undesirable moral and juridical consequences. In keeping with indigenous views such remarriages are, however, unattended by festivity or ceremony (—).

There is no minimum marriage age for boys or girls among Moslems, and a girl in this law area is usually married off by her parents when [575] still very young (it is done, Moslem fashion, by the father as 'compelling *wali*' — p. 82) without consideration for her wishes. On Kangean, however, where girls have more say, they marry later, and should a girl be forced into an unwanted marriage she will often run away to the man of her choice. If she returns home with him after a few days, her parents will usually give their consent (cf. the elopement marriage on Ambon and other places). Such marriages are also reported from Bawean under the term *buru tataban,* and from the Madurese areas under the term *adhat pelloq.* Among Protestant Christians, the church council often sets a minimum age for girls, say fourteen or fifteen, but even where this is not so a missionary will refuse to solemnize a marriage if the boy or girl is too young.

The preference for marrying off daughters in order of birth (above) occasionally leads, among Moslems, to a *pro forma* marriage of an older daughter to a young boy or an old man in order to facilitate the marriage of her younger sister. Among Moslems the blood *wali* has the right to prevent marriage with a man of a lower social class (such marriages require the consent of both the blood *wali* and the woman). Protestant adat rules sometimes prescribe a certain standard of material well-being, as well as membership of a Christian parish or adherence to Christianity. Neither Shafiite Moslems nor Christians (in respect of church marriages) may marry adherents of another faith (—).

[According to several reports] the village authority is involved in the conclusion of all marriages (nowadays for registration purposes), the village headman, scribe and messenger receiving tribute gifts which may be greater when the bride marries into another village. [*576*] The village authority is likewise involved (and paid material tributes) in the dissolution of marriages and sometimes also in the revocation of repudiations. The village Moslem officiant, too, renders his paid services when marriages are solemnized. On Bawean the village headman plays a part in the marriage proposal and in setting the date of the wedding. Nevertheless, it seems clear that in this law area the influence of the village in matters of marriage is declining and that marriages have long ceased to be a village interest in the way they are in Aceh. The adat regulations of Christians do not even mention the village. Marriage is more the concern of relatives, and the couple are in fact married off by their kin.

Here, as elsewhere with Moslems, the old indigenous features which accompanied the conclusion of marriage have given way to Islamic law, because the validity of marriages has for centuries been judged by the regency *penghulu* who, under the supervision of the *regent,* applied the rules of Islam as the only standard. What has remained, purely as custom, are the divination of fortune; the festive procession to the bride's house before (on Bawean, after) the Moslem marriage ceremony in order to 'hand over' the bridegroom, the food for the feast and perhaps a trousseau; and the festive wedding meal (—). From the start of the festivities the bridal couple are called *pengantèn* (—).

The circumstance that in Central and East Java the bridegroom observes the old indigenous custom of paying the bride's family a sum of money, *tukon* (from *tuku,* to buy; or in High-Javanese: *tumbasan*), has given rise to the view that this represents a rudiment of a former bridewealth (—). Yet there are no exchange marriages or other patri-

lineal institutions in Java, nor a partial refund (by a reciprocal gift) of [577] the *tukon,* which is spent on necessities for the marriage (even among Christians), and there is no evidence whatever of a form of service marriage in lieu of payment (—). *Tukon* is a means by which the bridegroom's family helps to defray the expenses incurred by the bride's family.

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[578] Marriage by elopement or flight, which still occurs on the smaller islands (above) as an indigenous form of marriage, is apparently not (any longer?) known on the mainland of Central and East Java. There is no evidence that marriages by elopement require any formality, except to be concluded according to Moslem law (by an emergency *wali* or government *wali* — *penghulu hakim* — as has been explicitly reported from Bawean). But once the eloper returns home with his wife he must make the event generally known (—).

The Moslem conclusion of the marriage (*ningkah, peningkah*) is the same here as everywhere else: a contract between the bridegroom and the marriage agent or *wali* of the bride (her blood guardian or *wali nasab,* emergency *wali,* government *wali,* assistant *wali* — see pp. 83-4). Here, too, it is established custom for the religious official, as the authorized agent of the blood *wali,* to conclude the contract with the bridegroom, although it is sufficient for him merely to supervise the transaction.

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[579] Immediately after the Moslem conclusion of the marriage a conditional repudiation (*taklèk*) of the newly married wife by her husband takes place, in accordance with a royal edict [dating back to the old empire of Mataram]. The pronouncement is made in a stereotyped but locally varying formula, prompted by the marriage official and repeated by the husband who knows no better than that this is part of a valid marriage. In these formulas, which considerably strengthen the position of the wife, it is declared that the repudiation will release her from the marriage if the husband stays away for a certain period (from seven months to two years, whether at sea or on land) without sending word to her, or if he maltreats her, or fails to provide for her for a certain period, and so on, provided [580] that she herself gives notice (*rapak*) of his misconduct to the religious judge and declares that she is not prepared to tolerate it.

According to Moslem law the marriage contract obliges the husband to make his wife a marriage gift, which is contractually specified, or

is determined later in relation to her social standing, or is in accordance with the custom of the land. In this law area such a gift is called *mas kawin* or *sri kawin;* it has slight value compared with the indigenous gifts (*tukon,* etc.); usually it is determined by custom and is paid late.

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[*581*] What now are the personal and financial relations between the spouses after marriage? Here the indigenous notion of jural equality comes to the fore, and Islam and Christianity recede into the background. The custom that the young couple move in with the parents of one of them is generally known, and it entails the duty of the [*582*] husband or the wife to work for his or her in-laws as long as they live there. [But] this is in no way a service or adoptive marriage (pp. 168, 174). Many Christian parishes prohibit this form of co-residence as a source of domestic trouble. Should the couple move into a house of their own — on Bawean this happens immediately after marrying — they may do so in any *désa.* There is no evidence of avoidance [*pelali*] of parents-in-law.

The woman's blood *wali* ceases to play a role after her marriage, and unless it is dissolved he no longer has authority over her or the obligation to assist her. Jural equality entails that the wife (*rabi*) may act without her husband (*laki*), as he may do without her, and that where necessary one spouse can represent the other in transactions or in court. In most Javanese (and Madurese?) households the wife manages the common finances, and trades at the market on behalf of the family. A clear indication that a married woman controls her own property is the fact that, after her death, a custodian is chosen from among her relatives to take charge of her property for the benefit of her under-age heirs. This rule, though rightly adopted as a premise in the adat regulations of Javanese Christians, does not prevent mal-administration by her relatives, and has therefore been amended.

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[*583*] As regards the initial contributions and the money earnings of the spouses the same principles apply as are found in other parts of the archipelago with bilateral kinship organization. Everything the man brings into the marriage (*barang gawan, barang bektan*) remains his; everything the woman brings into the marriage, including her betrothal and marriage gifts, remains hers. But the judicial application of this rule is hampered because usually no attempt has been made to stipulate which things belong to each category (the adat rules of Christians

prescribe that a record be kept). But apart from this — and in direct contradiction of Islamic law — the spouses share in common all accessions during the subsistence of the marriage, whether derived from their joint labour or (elsewhere) from the labour of one alone (—), but what comes to one of them by way of inheritance or gift is excepted; there is, however, no accounting for assets spent by one spouse without the other's objection. Such common marital property is called *guna-kaya* or *gana-gini* in Java and *ghuna-ghana* in Madura. [*584*] Even the religious judge dared not, traditionally, ignore this fusion of marital property and he takes due account of it; should he seek to accommodate it to Moslem law he will — as in Aceh, Minangkabau and other places — construe it in the form of a business partnership (*sarikat, sirkat*) between husband and wife. After dissolution of the marriage this common property is in some places divided, with half or two-thirds going to the husband — the latter proportion is derived from the somewhat analogous rule of Moslem inheritance law. In the past, the division could instead be based on an estimate of the value of each spouse's labour. The Protestant missions attempted to add to this common *gana-gini* property such goods as had been brought into the marriage, but they have probably now given up this inexplicable endeavour. It is puzzling why Willinck (1909:623-4) should have presented the common marital estate as a derivation from matriarchy. Husband and wife together administer the common estate, or else one leaves its care and disposition to the other.

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It is the husband's duty to maintain his wife, even while they are still with the parents of one of them; it is not clear whether this requirement is based on old indigenous law. In Moslem law it is too difficult for a woman to prove inadequate maintenance as a ground for divorce, but the formulas of conditional repudiation (above) solve this problem for her.

[*585*] The traditional dissolution of marriage is, on the face of it, wholly superseded by the law of Islam or Christianity; yet it has not vanished altogether. In keeping with jural equality, and because many marriages are arranged by the families without regard for personal feelings, dissolution is common. On Kangean, however, where a woman has more say in her marriage, the tie between husband and wife is said to be less tenuous.

In the old kinship order a marriage could be dissolved at the instance of either party or by mutual consent, and in the presence or with the

cognizance of the village or other authorities. Unilateral dissolution by the husband, usually called 'sending away' (*mamolè*, etc.), has continued in the Moslem form of an ordinary repudiation (*talak*), for which no reason need be given, and which may be twice revoked (*ruju*) during the *iddah* period (pp. 82, 88). It becomes irrevocable only with the third repudiation. A subsequent other marriage of the woman makes it possible for a man to remarry his former wife on the old footing (i.e. with the right to three repudiations). This form of *talak* is common among Javanese and Madurese and usually takes place, without concrete symbols, once at a time; but a threefold repudiation is permissible and then becomes immediately irrevocable, though this is still followed by the *iddah* period. The cognizance of the authorities was restored by ordinance in 1895, in the sense that the man must within three days of repudiation or revocation notify the district *penghulu* or other marriage official under whose jurisdiction he now falls (—). In accordance both with Moslem law and with popular ideas which coincide on this point, a repudiated woman is regarded as a wife as long as the repudiation is revocable.

Very little is left of the unilateral dissolution of marriage by the wife. She can go to the religious judge (regency *penghulu*; nowadays, 'council of priests') to ask for a divorce (*pasah*) in those rare cases which are recognized by Islamic doctrine but difficult to prove. In [586] addition however — and this provides most of the cases before the priests' council in Java and Madura — she can, by virtue of the conditional repudiation (above) and as prescribed in the *taklèk* formula, terminate her marriage by giving notice (*rapak*) that her husband's behaviour is unacceptable to her. This notification, in which she is accompanied by two witnesses, is not a processual claim for legal redress, and the missionary (Hoezoo, 1874) who raised alarm about the scandalous judicial practice of the *penghulu* in a *rapak* case missed the point that there is here no question of a judicial process. Even this conditional repudiation can be revoked after the wife's notification, unless it was either a threefold conditional repudiation (which is exceptional), or included a formula stipulating the return of the Moslem marriage gift, which has the effect of turning the repudiation into the redemption of it. Apart from these two possibilities, *pasah* and *rapak,* the traditional equality in the man's and the woman's right to divorce has disappeared under Moslem law. The result is usually that the woman does not accept this restriction but simply runs away. Should she dissolve her marriage through the *pasah* procedure she

forfeits her claim to the Moslem marriage gift (*mas kawin*) if it has not already been paid.

The dissolution of marriage by mutual consent occurs among Moslems either in the almost unrestricted form of a repudiation by the husband with his wife's agreement (in which case all that has been said about *talak* remains applicable), or, rarely, through buying the repudiation (p. 89). Usually the latter method is an indigenous institution in Moslem wrapping — hence its indigenous term: *mancal laki* ('kicking oneself free of a husband'). The price of the repudiation (*yatra pemancal, duwit pemiwal*) is arranged between the parties. Like the sale of land or movables this is not an executory contract involving an obligation to perform against the payment of money, but the 'delivery' of the repudiation for money. Under the Moslem term *kuluk* it was, moreover, also the appropriate Islamic legal remedy by which an important noble who had four wives already but whose concubine [*587*] (*selir*) expected a child, was enabled temporarily to divorce one of them in order to marry the concubine. The procedure gave him the advantage of irrevocability (despite the observance of a term of *iddah*) together with the possibility of later remarrying the repudiated wife.

But how is Christianity affecting the traditional principle of jural equality in Java? Had Islam not come between ancient usage and Christianity, one could imagine the three forms of dissolution of marriage persisting still, though under supervision and restraining influence by the authorities of Christian village or mission parish. There would have been no reason not to keep the dissolution by common consent which also Islam has respected, albeit under supervision. On the other hand, since Islam had stamped out the woman's right to dissolve her marriage of her own free will while preserving the man's right to do so in the purely Moslem form of repudiation, it is understandable that the two unilateral forms of dissolution did not readily revive among Christian Javanese, but came under the supervision of equally vigilant authorities. That is to say, all forms of dissolution, whether by husband, or by wife, or by mutual wish, may now take place only with the agreement of the authority designated for this purpose by a new adat law, who must judge whether the reasons of the parties are sufficiently strong to override the principle of the sanctity of marriage. There can be no objection to speaking of the decision of the Christian authorities as 'divorce', and to comparing it with a judicial dissolution, but there is no ground for saying that it is a civil law verdict within the meaning of section 78 of the

Regeringsreglement, and hence lawful only if pronounced by our *landraad* court (— —).

[*588*] Although there are considerable local differences in grounds for divorce [among Christians], they do not seem ever to be based on living indigenous law, but everywhere to be an imitation of western statutory grounds. It should be remembered that the traditional breakup of marriage, whereby usually one party leaves the village, is far from uncommon among Christian Javanese, and that the refusal to sanction dissolution often results in illicit cohabitation somewhere else. Hekmeijer quite rightly recommended in 1898 that 'one should not lay down rules, but judge each case on its merits . . . while considering the possible effect of refusal' (IG,1898,II:1325)

Traditionally (as happens elsewhere) the guilty party probably suffered material loss, either through having to pay the innocent party, or through losing the right to claim [a share of the estate]. There is no trace of this left among Moslems, and the very fact that refund of the *tukon* is not even mentioned supports the view that this traditional payment was not bridewealth. Among Christians — and consistent with good Indonesian tradition — a guilty party is obliged to contribute to the church fund.

Apostacy from Islam (conversion to Christianity) terminates a Moslem marriage; a Christian husband's conversion to Islam implies [*589*] that Islam does not recognize his preceding marriage; conversion from the Catholic to the Protestant faith, or *vice versa,* does not affect a Christian marriage.

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Looking back at this Javanese-Madurese marriage law we can see that its traditional principles are obscured not by rudiments of the old indigenous law, but by Moslem forms of dissolution and by the function of the marriage *wali.*

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Land Law

[*604*] It should be stressed that, though the traditional land law in this law area had much to contend with from the Mataramese imperial government, it was fortunately not marred by it. Where provincial governors were stationed, they received pieces of land in apanage, to the detriment of the rights of villages and individuals. The sovereign also created exempted villages, reserved royal domains, and committed other abuses of power, but for the rest Javanese land law generally

remained as it had been before. Even in old-Kedu, which belonged to the state's heartland (*nagaragung*), the old land law can still be identified. In Bagelen, on the other hand, it was almost as grievously impaired as in the present-day principalities themselves.

The survival of the ancient indigenous situation is at once evinced by the existence of the right of avail in the Javanese and Madurese villages. Found almost everywhere in the regions outside Java — only among the Gayo and Toraja and in Gorontalo is it not fully developed, while in Aceh and in respect of the *sawah* of Bali and Lombok it has almost vanished — this right is here always vested in the village. In Central Java moreover there sometimes exists (existed) a separate right of avail of the parent village and of its hamlets, or of a few of the latter together — a situation comparable to that in Karoland. In this law area the right of avail of the village embraces both virgin territory (jungle) and arable land reverted to wilderness (*ara-ara*), as well as arable and residential land actually in use. It apparently also extends over water. The boundaries of each area of avail are precisely known to the inhabitants; except in areas such as old-Probolinggo, the south of old-Pasuruan and Besuki, which remained sparsely populated for a long time and where village domains as a result were only vaguely delimited. The manifestations of the right of avail are the usual ones: freedom of [*605*] exploitation by the members of the village; prohibitions for outsiders except with the permission of the village and in return for a recognition payment; involvement of the village in matters affecting arable land; short- or long-term control of certain parts of the village territory; and liability of the village for certain wrongs. There were, however, some graded differences. Even in 1878 there were still villages which prohibited any land reclamation by members of other villages — a situation reminiscent of the Ambonese Islands. More frequent and resilient are or were the prohibitions for outsiders to cut wood and gather wild produce. In a second large category of villages, outsiders were not only allowed to cut or collect wild produce, and to hunt, but to acquire temporary tenancies or very short-term adat-ownership (e.g. three years); though not to buy land. Meanwhile the third category of villages, where outsiders could freely reclaim or even buy land (as on Bawean as early as 1872), has steadily grown larger. But even here the village retains the right to dispose of abandoned arable land or of residential plots falling free because of people dying or moving away. The recognition payment, which is reported to be found in the whole of Central Java as well as Surabaya (but unknown in the

Madurese law district?) is to this day called *pamesi* or *mesi*; though many other versions have been recorded (—). Paid in kind, sometimes in produce plus money (*penatas oyod*), it is occasionally given to the (jointly sharing) core-villagers, but usually to the head of the village or hamlet. It never seems to be paid into the recently instituted village treasuries (where these exist), probably because the Government does not recognize recognition payments as legal obligations. Such payments can thus be required for permission to reclaim land, fell timber, collect forest produce (e.g. bamboo, rattan, *arèn* juice), hunt, fish, graze cattle or turn out ducks, lay on water supplies, or make any other profitable use of the land. Where a hamlet has its own right of avail, a fellow-villager of another hamlet counts as an outsider; and in at least one [*606*] place, Pasuruan, one finds the phenomenon of several neighbouring villages (within the domain of the same regional head?) counting as one for the purpose of the right of avail. Even in Bagelen, numerous manifestations of the right survive, which can only be of ancient indigenous, and not Mataramese, origin. A Javanese or Madurese name for this right does not exist, its various expressions apparently never having been conceptualized in a single term. It will be shown shortly how the Government proceeded with regard to the right of avail, but first we must have a clear idea of its local dimensions in Java.

There are two kinds of situation. In some regions, like densely populated Kedu, the village areas of avail are contiguous: here, therefore, the Minangkabau rule applies that every patch of soil has its right-holder. Those wanting to reclaim land outside their own village area (e.g. Christians in search of their own settlement) will always need the permission of some other village authority; and if the right of avail is still vigorously asserted they would never acquire more than a temporary tenancy or short-term adat-ownership. In other regions, large tracts of no man's land lie (lay) between the village domains(perhaps the name *rayahan*, 'poaching ground', also refers to this sort of area). Whoever wants to reclaim land or collect wild products here is perfectly free to do so under adat law; he can at once acquire adat-ownership of it, and the resulting settlement may in turn develop into the centre of a new domain over which it exercises its own right of avail. How exactly this process takes place, does not seem to have been investigated. Incidentally, it should be noted that stretches of forest and long abandoned arable land are often individually named in Java.

How is this right of avail manifested in respect of arable land and residential plots? First, in some villages, in the interdiction already mentioned of alienation to non-members; and everywhere in the village authority's control of lawful alienations; further, in the return of abandoned land to the unfettered right of avail of the village, to be administered as land 'in intermediate state' (*gantungan,* etc.) until it [*607*] can be allotted in adat-ownership again. (The *akuan* land in Pekalongan seems to fit into this category, with the difference that it is given out only under temporary tenancy.) All these expressions of the right of avail appear to us to be tolerable.

A more serious incursion on the proprietary rights of individuals lies in the right of the village to excise pieces from existing fields and residential plots, or to re-divide them, when the need for more land arises — the same right therefore as is exercised by the Minahasan village and the traditional Balinese village. This right, described as *dadal* in Kedu, usually remains suspended in the case of newly reclaimed fields, whose owners therefore have no need to fear that it will be exercised in the first three years or so. Its most onerous application would of course be if, within his lifetime, the owner of a field or residential plot is repeatedly exposed to such reapportionment. Information on the traditional application of this right (not in isolated cases but as a general restriction upon adat-ownership) is especially scarce because more than a hundred years of Government practice has obscured the original indigenous practice.

Whether such interference can be arbitrarily limited to some landowners (e.g. recipients of abandoned land), or whether it should as far as possible affect all landowners equally, is not clear. From several regions, however, there is explicit evidence that anyone who has reclaimed a piece of land will not see it threatened during his lifetime.

In addition to temporary *désa* control of reverted fields and residential plots as well as *akuan* land, there is permanent *désa* control of those parts of the village domain which — in our terminology — are used for public purposes. Recognized as such are the village pastures or *pangonan,* the village burial ground where groups of close relatives can have their family burial places, and further the village roads and paths, the little village commons and so on. Where the right of avail is fading these aspects of it nevertheless remain, and even gain in [*608*] significance. As in the Minahasa and on Bali, the right of the village over these pieces of land (a right of avail) differs from its right in lands reclaimed or purchased by it (i.e. adat-ownership).

In view of the far-reaching implications of the right of avail it is obviously of great importance that it be applied fairly and disinterestedly. The fairness of its implementation leaves much to be desired if it remains in the hands of the village authorities. Time and again one reads of arable land reverting to the village, either appropriated by the village headman, or declared to be an official field (or is this lawful?); or regarded as village land and consequently allotted to share-cropping or rent paying tenants, or leased for the common benefit of the core-villagers or owners of village land. It is therefore encouraging to read that in many areas of Central and East Java the implementation of the right of avail was entrusted to the village elders mentioned above, the retired core-villagers whose disinterestedness was certainly more credible than that of the village authorities themselves. Information about the practice of these elders would be illuminating, but is unfortunately lacking. It should be noted that village authorities and elders are both acting in the name of the collectivity of core-villagers, who in the traditional villages constitute the governing power, and are in effect the *désa* itself (—).

The foregoing observations demonstrate that here, too, the right of avail does not remain static but changes with time, gradually becoming weaker and losing its prominence as the adat-ownership subordinate to it gains in strength and freedom. If the process is allowed to go on undisturbed, it may in some regions be completed quite rapidly, as it did for instance in Bagelen around 1900. What then remains of the old right of avail is only the reversion of abandoned land to *désa* control, and the participation of the village authority in transactions involving arable land; but recognition payments, the prohibition of land ownership by strangers and most of the other restrictions fall away. It goes without saying that, from our own economic point of view, this process of liberating individual rights deserves full approval, provided this does not take place until the village community instinctively feels that it is ready for such a change. (—)

[*609*] What then did the Government do with this widespread and deep-rooted right of avail? The *Regeringsreglement* of 1854 (—) recognized the right of avail over virgin land, and, besides section 75(3) even safeguarded it in section 62(3). Sections 1 and 4 of *Staatsblad* 64/1856 and the *Bijbladen* 377 and 2001 were in accord with this. *Staatsblad* 78 of 1874, on the other hand, and the reclamation ordinances of 1874 and 1896, unlawfully struck out the most important

part of the right of avail, although the reasonable purpose of these measures — to open up the land resources of Java and to prevent the exhaustion of the soil — could have been achieved equally well without attacking the right of avail. Hence the conflict which after forty years still continues between these ordinances on the one side and popular usage on the other, the latter being referred to as 'arrogation of rights' and 'clandestine clearing of land' in our administrative circles.

The same right of avail, however, is not only recognized in *Staatsblad* 64 of 1856, but also tolerated when arable or residential land becomes ownerless and reverts to the unfettered control of the village. Hence, in a borderline case in 1915, about a [privately rehabilitated] piece of land which had fallen waste between the village fields as the result of a river flood and change of river bed, the court was in doubt as to whether it was dealing with the still operative part or the abolished part of the right of avail (AB 14:69ff.). The confusion is [*610*] compounded because the Government, while ignoring the right of avail over virgin land, recognizes it in respect of cultivated fields and arable land, though on the illogical basis that the *désa* is not the bearer of the right of avail but the owner of the land; and that the individual right-holders are not adat-owners (subject to the village right of avail) but mere users of *désa* land. The most bitter fruit of this theory has been the conception that the village authority is fully empowered — in connexion with the land-rent system, compulsory cultivation and labour services, i.e. in our interests — periodically to remove land from the owners and to apportion it to other individuals for equally short periods: an excessive use of the *dadal* right [of expropriation] which led to shameless abuse. This whole system as regards arable land is then called 'communal ownership' of the fields. The fields themselves are called *sawah désa, sawah bumi, sawah kongsèn, sawah raja,* etc. As against this alleged village property — wholly different from genuine village ownership of land — only the other extreme is posed, usually equally foreign to adat law: a strictly individual ownership unaffected by any superior right of avail.

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[*611*] After the village right of avail comes the indigenous right of adat-ownership, which embraces both what the Government calls 'individual property', and the so-called 'users' shares in communal land' which are in fact private property subject to a vigorous right of avail. Its former manifestation is found everywhere in Madura and Bawean and in a large part of Java's eastern corner; the latter occurs else-

where (—). An Indonesian word for adat-ownership (associated with *duwé* or *gadah,* to possess) is lacking; the Moslem term *milik* is usually employed. Should an Indonesian himself wish to indicate the basis of his proprietary right, he would distinguish land acquired by his own occupation from land obtained by transfer (purchase, etc.) or other means of acquisition like inheritance [thereby employing a rich variety of descriptive terms].

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The content of the right of adat-ownership of land (i.e. arable fields, fishponds on *sawah* land, shallow pools (*rawa*), saltings in Madura, etc.) is the capacity to act as lord and master of such land, subject to a [*612*] threefold condition: (1) observance of the right of avail of the village insofar as adat-ownership is still restricted by it; (2) observance of the rightful interests of other landowners — for this reason the hereditary servitudes which were indispensable in the individualistic Roman law are superfluous and unknown in adat law; (3) observance of the explicit adat law regulations for landowners (e.g. the duty to allow another's cattle on one's land as long as it is fallow and is not enclosed). In regions such as Madura and Bawean, where the right of avail has practically vanished, or in respect of beach-ponds and the like, where it has become dormant, such emancipated adat-ownership might be equated with (oriental) absolute ownership, were it not for the danger of thereby making too sharp a distinction between the emancipated and the still communally encumbered version of adat-ownership. This would, moreover, conflict with the government usage in this law area of vesting the nominal 'ownership' of such land in the State. (—) Besides indigenous individuals, also indigenous corporations can have adat-ownership of land.

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[*613*] The right to alienate land (by sale, barter or gift) is rarely if ever excluded from the powers of an adat-landowner; but in the more traditional villages he may alienate only to fellow-members of the *désa.* (—) He may further let his land on a share-cropping basis, or for a rental, or in return of a loan, etc., but always within limitations which the right of avail imposes on such transactions. Adat-ownership does not as a matter of course include the right to subdivide and apportion jointly held land. A *sawah* inherited by four children may therefore have to be allocated to one of them, or they might take turns in using it. Adat law often recognizes a minimum area which may not be diminished by subdivision. On the other hand again, division is

permitted when some people jointly clear a piece of woodland with the intention of dividing it up. (—)

Among the obligations of the adat-owner is the one already mentioned of allowing other people's cattle on it outside the crop season (as in Aceh and elsewhere), and of allowing free passage to anyone who needs it (*Eindresumé* III:188). By far the most important obligation is, of course, that of tolerating, where necessary, the excision of a piece of arable land by the *désa* or even the reallocation of land as described above. It still seems to be an open question whether the obligations of those to whom the village authority has granted a piece of *gantungan* (reverted) land are stricter than those of the ordinary adat-owners. As against some sources which report not only that the village retains some supervision, but even that such recipients have but temporary tenancies rather than adat-ownership, there are many others which contradict this. But one may, perhaps, assume that a village authority is [*614*] more likely to take from the occupier of a piece of *gantungan* land than from the owner of self-acquired land. Other obligations of the adat-owner worth mentioning — all presumably deriving from the right of avail — are: to report to the village headman when the standing rice is ready for harvesting — the headman then gets a few pence per *bau* [appr. 1¾ acres], and the wife of the headman is allowed to cut the first *padi*; in traditional villages, not to change the use of a field without the approval of the village authority; and at times such as the harvesting of late crops, the annual picking of fruit trees, the felling of trees for firewood, to give the headman a share (*pegubuk, gobangan, pesusur*), such a share clearly revealing the connexion with the right of avail, for it is larger in the case of a stranger than of a village member. (—)

The usual way of creating adat-ownership of land is by the lawful clearing of forest or other virgin land; this corresponds to the acquisition of adat-ownership of running water by constructing an irrigation system. What rights, if any, arise when such activities contravene adat law, will have to be decided by the court on the merits of each case. Adat law never has fixed rules for such hypothetical situations. Joint reclamation of land by a number of villagers leads to common ownership of it; reclamation at the instance of the village leads to genuine village ownership. Reclamation on the orders of a prince or a village authority sometimes had an altruistic aim, in that the developers themselves gained adat-ownership of the fields thus won; usually, however, they became the prince's or headman's *sawah*, attached to his office or

person. If the prince allocated them to a headman or favourite, they were called *sawah ganjaran,* or, in an unusual sense, *sawa pusaka,* in which case the initial occupiers were usually granted a tenancy at will (see below).

A second way of creating (actually, recreating or reviving) adat-ownership was through the allocation by the village authority of a piece of land which, having become ownerless, had reverted to the unfettered right of avail of the village (*sawah gantungan* etc.), or which had been requisitioned (*dadal*).

[*615*] The transfer of adat-ownership of land and fishponds can be done by sale, barter or gift, transactions which are actually forms of transferring property, and not agreements creating the obligation to transfer property. Should the latter be intended, the mere expression of consensus is not enough. Just as betrothal in Indonesian adat law only becomes legally binding upon the giving of a betrothal gift or pledge, so these property transaction only become legally binding when confirmed by a tangible token, called *panjher* or *kencèng* in Madura, or *panjer* in East and Central Java. This 'material binder' or bond sum (for it is usually a coin or sum of money) is wrongly regarded and translated as an 'advance payment', for it is not deducted later from the price. In more recent times, an inscribed piece of paper often served the purpose, as it did in medieval French law (Esmein, 1883); and government judges who erroneously expected to find in it the proof of an agreement had no good reason to be surprised by the unilateral and laconic form of this written token (*tanda*). Yet another misunderstanding comes from our habitual translation of the Madurese *jhuwal* and *belli,* and the Javanese *dol* (High-Javanese: *sadé*) and *tuku* (High-Javanese: *tumbas*) as 'to sell' and 'to buy', whereas they can in fact also apply to other kinds of transfer of physical control, including temporary transfers for a rental or in return for a loan (—). The specific meaning of these terms becomes clear from the verbal context in which they are used (e.g. people *jual* arable land for a year in return for a certain payment).

It is understandable that in areas in which the right of avail is still vigorous the village authority must co-operate when land or fishponds are transferred by sale or barter (also with gifts?). Although this is required for the validity of the transaction it is misrepresented by our idea that the village authorities merely act as witnesses. Sometimes their involvement can be inferred from the recurrent reports that they receive some money whenever land is alienated. It is striking, however,

that their involvement continues even when the cause of it (i.e. the right of avail) has disappeared. Though severed from its root cause, but found to be a practical means of promoting legal certainty, the assistance was thus retained as an element of legal validity, and not [*616*] — as Europeans tend to think and as terms like *pesaksèn* seem to imply — merely to have witnesses, or for ceremonial purposes. Its obligatory nature often seems to have been reduced to the mere duty of notifying the village headman. The Goverment's requirement that the headman must report all important changes in land ownership to the administration is consonant with these trends. One sometimes reads of certificates of transfer being drawn up in the village. At some places the village authorities, officials and neighbours present at the payment of the purchase price, would receive some money from the seller and purchaser jointly (—). The data sometimes differentiate between wet fields and residential plots. In transfers drawn up by a notary the village authorities are often the witnesses.

There are separate rules for the division of estates *inter vivos* (*pawèwèh*), but it is not clear how an outsider would know the difference between them and ordinary gifts.

The permission to lay a water course over cultivated lands seems to include transferring the proposed water bed. In several areas this used to be done only against payment (purchase or damages?), with the peculiarity that double the value of the land involved was paid. Sometimes permission would be given only if the constructor agreed to take the entire plot of land (—).

Just as occupation of virgin land is the normal way of acquiring adat-ownership, so the natural way for ownership to lapse is for the state of occupancy to end. Sometimes the right is extinguished by abandonment and neglect; but more often when nothing remains to be seen of previous cultivation — e.g. when no traces are left to the little *sawah* dikes; or when no one remembers any longer that it was once cultivated or owned, or when this situation has existed for some twenty years or so (when the right to it is said to have expired, *kedaluwarsa*). Probably these popular explanations reveal something of the growth of adat law, but it is also one of the things by which critics like to [*617*] demonstrate how hopelessly inconsistent adat law in Java is.

A second way in which adat-ownership is extinguished is when the owner moves from the village. A third is appropriation by the village by virtue of its *dadal* power, whereby a piece of land reverts to the unfettered right of avail to be reissued subsequently to a new adat-

owner. A fourth way of extinction occurs in the areas where strangers (non-*dêsa* members) can acquire a short-term ownership of wet fields (e.g. for three harvests) instead of a mere temporary tenancy; the land automatically reverts to the village when the term ends.

One reads of numerous regions where even the land of the villagers themselves is taken back for redistribution two to five years after the initial cultivation. If this is not ancient adat law but the arbitrary action of the princes or our government, then it is probably by analogy with the similar rule mentioned above for outsiders. One also finds repeated mention in early reports of adat-ownership being extinguished because of default of compulsory services or land-rent, the faithful rendering of which would thus constitute a necessary attribute of indigenous landownership. But since this is also a feature of ownership of wet fields in Lombok, and appears to have derived from tenancies at will, it would in that case not have been of ancient origin but the result of royal despotism. Hence, it immediately ceases to operate in areas where royal influences, or compulsory cultivation, or other pressures, disappear. The antiquity of this rule is all the more suspect because it is rarely if ever cited in cases of default of village services, where one would expect it to have been applied first of all. Loss of ownership through passage of time alone (negative prescription) is here as unknown as in the rest of Indonesia. The Javanese word *kedaluwarsa* is used in a different sense (mentioned above), in which the chief consideration is not passage of time but absolute uncertainty as regards past ownership.

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[*618*] Accretion of land by silting or alluvial deposit — no rare occurrence in lands bounded by the sea and subject to river-floods — may affect both the right of avail and adat-ownership. The new land falls under the right of avail of the village within whose domain the accretion takes place, and can usually (invariably in the case of beach-ponds) be transformed into private ownership only by actual cultivation. But should small-scale accretions take place to a person's field, *sawah* pond or residential plot, the new ground falls immediately under his adat-ownership.

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[*621*] Residential plots (*pekarangan,* sometimes *wengkang* or *pamengkang*; *kampung,* if the plot is enclosed; on Bawean, *pamangkang*) in this law area appear to be in adat-ownership, which in Madura is as freely obtained as ownership of *tegal* [dry] land, but in Java is subject

to various limitations. For though in most regions of Java residential plots can be alienated to fellow-villagers or prospective members, or — though rarely — be rented or held in return for a loan, no one was allowed to own more than one plot (—) and any division required the co-operation of the village authority. Although, as in the Minahasa, the traditional redistribution (*dadal*) power of the village is more readily aimed at residential premises than at arable land, the Government's periodic reallocations of village territory fortunately did not involve residential plots — the explanation offered being that 'communal ownership' of residential plots is exceptional. This exception can be discovered first of all in Banyuwangi, where the (undivided) residential land remains under the control of the village authority, thus leaving the occupants with only temporary tenancies; and further in those regions where a 'share in the communal land' automatically involves the possession of residential premises. Adat-ownership of residential plots originates either by their preparation on virgin or cultivated land, or by the allotment of existing plots which had reverted to the temporary control of the village (*suwung, lowong,* etc.). In most of this law area the origin of a residential plot does not affect the right acquired in it, unless the former owner returns within a year or so; in respect of arable fields, however, the nature of the right obtained is still open to question (p. 186). For the alienation of plots the co-operation of the village authority and the presence of witnesses are required. The right ceases for instance if the incumbent moves to another village; and if two plots fall into the same hands it ceases in respect of one of them. The village authorities can insist that owners keep their premises in good order.

In this law area, too, the ownership of crops and trees (see under Law of Chattels) is independent of the ownership of the land.

Tenancies at will — similar to those found on Bali, Lombok, and in the central Javanese principalities (and formerly in the Madurese [622] princedoms in respect of *sawah* lands which are now held in ordinary adat-ownership) — are rare in this law area, and mainly apply to *sawah ganjaran* (p. 187). In course of time they change into normal adat-ownership, but should be called tenancy at will as long as there is a superior who can arbitrarily terminate it.

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Despite the reclamation ordinances of 1874 and 1896, temporary tenancies (older than adat-ownership) of land sometimes referred to as *gaduhan,* still exist where there is extensive shifting cultivation of

fields (—). They may be found within a village territory or in former no man's land. The right to the swampy sites of *nipah* palms is equally unstable, and is usually also described as a temporary tenancy. Another [623] kind of temporary tenancy is exercised by non-members, particularly in Central Java, when they reclaim virgin land, or build fishponds on the village territory. In the course of time adat law adjusts itself, especially in East Java, by allowing them to acquire ordinary adat-ownership of permanent dry fields (*tegal*), but of wet fields (*sawah*) for no more than three years or so; at a later stage they can acquire ownership by reclamation or by conveyance or other transfer. A third variety of temporary tenancy comparable to that in respect of *padang* land and *tanoh raja* in Aceh is the right to *akuan* lands (p. 182), which again corresponds closely to the tenancy of residential plots in Banyuwangi. None of these temporary tenancies can be alienated or inherited. All expire when the cultivation of the land is completed or discontinued. Fields abandoned under shifting cultivation are called *talun,* or sometimes *pengalang-alangan.*

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[624] In addition to the apanages of the imperial officials of Mataram, which did not give them rights in the land itself, there were, and still are, official fields for the village headman, his assistants, the custodians of the graves, and such modern dignitaries as schoolmasters. These fields are called *sawah* (or *tegal*) *bengkok;* or sometimes erroneously, *lungguh,* apanage. The beneficiary is entitled to exploit them for his own and his family's benefit, but may not alienate them or let them be tenanted in return for a loan, nor, probably, for a rental or for share-cropping (although the rents ordinance permits the letting of such land, even to Europeans). The fields were not heritable (unlike the crops standing in them) but remained attached to the office. The cultivation of official fields, at least those of a village headman, was mostly done as a form of village service or mutual assistance in return for food and refreshments. They were wholly or partially free from royal *pajeg* levies.

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[625] Mosques and the like cannot be endowed with *wakap* lands in areas where the right of avail still curtails the freedom of individual owners, and such lands are therefore virtually unknown in Central Java. They may well occur in the Madura law district.

In adat law the right to occupy virgin land was open to everyone for the no man's land between villages, and to villagers for the domain

of their own village, but to non-villagers only with special leave and a recognition payment. In the first two cases continuing cultivation gave adat-ownership, but in the third case often only the rights of a temporary tenant.

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[626] The rights to cut wood, to collect forest products and to graze livestock are subject to the same distinction between no man's land and village domain.

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In this law area, too, preferential rights to land are of two kinds. First, as the option of a prospective occupier of virgin land, provided he has the necessary permission and — sometimes — has marked out the land. This right appears not to be transferable; it expires upon death, or (usually) after a fixed period of inactivity, or when, after preparations have been completed, temporary tenancy or adat-ownership takes its place. (—). Secondly, in the western half of the law area, the builder of a water course has a preferential right to the virgin land which can be irrigated from his water supply, for such land cannot [627] without his permission be occupied by another (who would, by virtue of his occupancy, obtain an independent right to draw water from this source — see below), whereas he himself needs no permission. In the eastern half of the law area, however, the existence of this preferential right to adjacent land (*dedelan*) is being denied, although there, too, any person who clears land within range of a water supply gains the right to draw from it to the disadvantage of its owner. There appears to be no evidence for a third type of preferential right, that of the previous owner in relation to his former fields (are these also called *talun*?), which would have had the effect that they might not be re-occupied without first giving him the opportunity to do so.

A right of first option or pre-emptory purchase by fellow-villagers is reported for the case where a man wishes to sell his residential plot to a newcomer to the village.

Giving tenancy of arable land in return for a loan of money is very frequent. It is called *aghadhi* in Madura, *anggadé* in Java (High-Jav. *anggantos*), *asanda* on Bawean. This kind of transfer to the physical control of another person falls within the meaning of the general term *dol,* and has engendered the fallacy that it must therefore be a 'sale' (with right to buy back). The arrangement can last decades without the slightest danger to the ownership itself of the land, but because there is

no periodic acknowledgement of ownership here by means of tangible token like the Minangkabau basket of rice, judicial proof of it is difficult, even though the participation of the village authority is required for the validity of the transaction. To require registration on pain of voiding the transaction would only make a pretence of solving this difficulty. The transferor is mostly the adat-owner of the land, but also the creditor-tenant appears to be entitled to sub-let it; moreover, he actually can, with the agreement of the owner, transfer his full tenant-right and the land concerned to a third party, who pays him off and is thenceforth the owner's creditor. In Bawean, if the tenant wants to make over the land in this way (*masanda ganti*), it often happens that the initial transferor (the adat-owner) substantiates his right in the land by erecting a rest-hut (*pondok*) or something similar on it. Wet rice fields, fishponds, and residential plots can all be the subject of tenancies in return for loan; but these are possibly only for landed property which is comparatively free from the right of avail — hence not in respect of what the Government calls 'changing shares in communal ownership'. Since the value of the land thus handed over is generally much higher than the capital sum the payment of which [*628*] redeems the land (*nebus,* from *tebus*; in Madurese *nebbhus*), and since the produce of the land constitutes an ample return on the money advanced, the creditor has nothing to gain from a speedy redemption. Quite frequently the transaction is linked with the handing over of the field on a share-cropping basis (or of the residential plot for rental) by the creditor to the owner, who on the face of it simply retains his field or homestead, although his legal position is totally different and more complicated, and although the tenancy-loan agreement itself may last much longer than the share-cropping agreement (usually concluded for periods of one harvest or season at a time) or agreement to rent.

Normally, no time limit is stipulated for tenancies in return for loan, but sometimes the agreement specifies a term for redeeming the land, after the lapse of which the creditor may appropriate it.[4] The view that these two forms are distinguished by different legal terminology (Madurese, Javanese, Malay) seems to be mistaken. The kind of transaction in which the tenant-creditor has the right ultimately to auction the property does not exist. The property can be redeemed at any time, provided the tenant has been able to harvest the land at least once. The crop which may have been standing on the field when the transaction was concluded remains the property of the loan debtor, and the crop

standing at the termination of the tenancy still belongs to the tenant. Land so tenanted can be inherited and, with it, the closely associated right to redeem it.

The tenant-right is established by the act of putting the land at the disposal of the loan creditor. Any promise regarding a proposed tenancy is only binding if substantiated by a tangible token, either *panjer* or a written document. Our courts have often misunderstood the terms *dol* and *jual* in documents relating to these transactions, taking them to mean contracts of sale. Often, in fact, on the urging of the tenant-creditor the document wrongly pretends to be a genuine sale, though the sham is duly revealed by the excessively low 'purchase' price. Once established, the tenancy of the land has an existence quite independent of the loan debt which usually motivates the transaction, until the moment the land is redeemed, or until the tenancy agreement is transformed into a genuine sale by means of an additional payment to the debtor-owner.

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[*629*] Share-cropping contracts, concluded by putting the land at the disposal of the cultivator, are very common. The basis on which the harvest is divided — one-half, a third, a quarter, two-thirds, three-quarters, etc. to the cultivator — depends on the nature of the soil and the respective claims of share-cropper and land-holder. Half-shares is called *maro* or *memaro* (from *paro,* High-Jav.: *malih,* from *palih*; sometimes *mertandukaké*; Madurese *maron*); a third-share *mratelu* (High-Jav.: *mratiga*); a quarter *mrapat*; a fifth share *maralima.* With half-sharing, each party generally bears half of all the costs, while the share-cropper is responsible for providing the ploughing team. Variations on this general principle often have their own Indonesian terms. The land-holder can either be the adat-owner of the land or a tenant in return for loan (also the beneficiary of an official field?). It is chiefly land-owners without draught-animals, or caretakers of estates shortly to be distributed, or major land-owners (still rare in this area), as well as (formerly) apanage holders, who let out land on a share-cropping basis. The cultivators (share-croppers) include young bachelors, and sometimes students at a religious school who have to see to their own subsistence. Usually it is *sawah* land which is under share-cropping contract, but sometimes dry fields, orchards (cocos, etc.), or, on Madura, saltings. There may also be share-cropping in the exploitation of a fishpond. The agreements usually cover one harvest (main crop only) or one agricultural season (both main and late crops, often

divided differently). Apportionment seems to take place after the harvest, but it is not reported who has first choice, or whether the land-holder gets his share delivered at home or has to see to its removal himself.

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[*630*] Renting of land (*séwa, nyéwakaké*; sometimes *ngadol, enjhuwal, nglanjak*) between Indonesians does occur, though less often than share-cropping. The payment made to the lessor is here a fixed amount (rice or money, or some of both according to the wish of the lessee), and not a fixed proportion of the harvest. If part of the payment is in money, it is usually made at the commencement of the contract.

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The question of how the conflicting interests of buyer and share-cropper (or lessee) must be reconciled by the court when a land-owner sells his land while it is being rented or held under a share-cropping agreement poses no real problem in adat law. Neither the rule that sale forecloses tenancy nor the opposite rule is conceivable in adat law. In each case the judges will investigate whose interests ought to weigh more heavily, and the disappointed party will be compensated by the seller if in the court's opinion such compensation is due.

A village's right of avail over the land within its domain is often combined with a similar right over water, with the same implications for villagers and outsiders (—). From the villages on the north coast [*631*] even a right of avail over the shallow coastal waters is reported. The boundary is (was) then sometimes marked off with lines (—). It is a natural expression of this village right of avail that the village headman should get up to one-fifth (sometimes called *pamesi* or *pameksi*) of the fish caught within its domain. This right of avail, however, seems to weaken more quickly than that exercised over land. In the first place, in many village areas all fishing is said to be free, and in the second, these village rights are often held in common with all the neighbouring villages falling under the same regional head (in the past) or under the same government-appointed *regent*.

Rivers and brooks in no man's land or in areas where the village right of avail over water has disappeared, do not seem to be subject to any rights in adat law. In the Javanese era [i.e. until the end of the Java War, 1825-30] villages given in apanage paid an annual levy, *tumbas toya*, to the apanage-holder for the privilege to use water.

As regards adat-ownership of water, the first right to be mentioned is that which a man has in spring water surfacing on his land,

immediately to be followed by the right to water standing in or flowing through his watercourse — a right which derives from his having constructed the water system itself. No other person may benefit from this water without the consent of the owner, and when it is used extensively the latter will demand to be compensated in kind (e.g. a fixed proportion of the harvest) or in money. However, anyone preparing a new arable field within the range of the water course — something which, as stated before, usually requires the consent of the water owner in view of his preferential right to the land — obtains an independent right to run off water if he shares the cost of maintaining the system (an infringement of the rights of the owner of waterworks which is unknown in Bali). On the other hand, anyone who helps to extend the system becomes co-owner of it and of the water led through it. The right in such a water system is inheritable, and probably alienable.

A second type of adat-ownership of water is that of salt water ponds (*tambak*) on the beaches at Semarang, Japara, Rembang, Surabaya, Pasuruan and Probolinggo. This right derives from the construction of the pond (subject to the village right of avail); it is heritable, [632] presumably transferable, and it may be let. As the cupidity of our agrarian system and *cultuurstelsel* did not extend to this type of pond, they were practically never misconstrued as 'communal property'. It is not clear whether, besides these two rights, there also exists adat-ownership of *waduk* or catchments.

A temporary water right exists in respect of flood or rainwater while it stands on a person's *sawah*. It is in the communal nature of village society that for wet ricefields dependent on rain (*sawah tadahan,* the usual kind in Aceh), this natural water supply should do as much good and as little damage as possible to neighbouring fields; but there seems to be no question yet of a neigbour's irrigation *right* in this connexion.

The right to irrigation and to reticulated water accrues to those who, as adat-owners or tenants, occupy *sawah*-land along a brook or artificial water course and who help to maintain this water system, whereby the water, having served a higher level *sawah,* must be allowed to flow down into the next *sawah*. These are not individualistic rights to the primary and secondary use of water, but rights to be exercised only for the common good; hence there is no need here for any 'servitudes' (cf. p. 185). That the right of irrigation and water reticulation would more widely benefit rice crops on *sawah* than any other crop seems to

conform to Indonesian thinking; it has been emphatically asserted though insufficiently documented so far. Transferring this right without the *sawah* itself changing hands (by sale or tenancy) is probably foreign to indigenous custom. If the irrigable area lies within the confines of one *désa,* the allocation of water rights is carried out by the village authorities — in the past, specifically by the retired elders — assisted by the village water board. Of its very nature this distribution is not a mechanical application of a comprehensive set of rigid village regulations, although rules about water rotation for different *sawah* complexes do exist. It is essentially a matter of mediation in order to satisfy actual needs. The same is true of arrangements extending beyond the boundaries of one village, which in the Javanese era were probably made by the imperial irrigation officials, who received a tax [633] for it paid in *padi* (*pemili toya*); since then by our district administration. The right to draw off reticulated water is withheld from anyone who does not contribute his proper share to the maintenance of the conduct system. In many cases its upkeep is considered a village matter and the responsibility of all core-villagers — a rule which, though welcomed by the Government in its construction of all land ownership as 'communal ownership', in no sense supports this supposition.

(— —)

So far as the right of avail of the village is still operative, non-*désa* members are entitled to fish only with permission and payment of a recognition, unless these requirements are waived between friendly neighbouring villages. From Tegal one reads of coastal creeks being subdivided for fishing, the allocations being constantly exchanged among the population (—).

To the entire land law in this law area applies what was said earlier about, on the one hand, the communal character of the Indonesian way of exercising rights, and, on the other, the concrete way of thinking of the Indonesians, who do not operate with property rights in abstraction, but with land or water *in terms of* the actual use of it as adat-owner or tenant, or for irrigation, and so on. Of the Indonesian urge to give abstract promises a tangible appearance, the *panjer* [bond sum] is the most obvious example (—).

Land and water rights not mentioned in this section (absolute ownership, *civilis possessio,* usufruct, etc.) do not exist here, and the negative prescription of rights is unknown, save in the self-evident case where all memory of them has been lost; the above-mentioned term *kedalu-*

warsa for the Dutch *verjaring* [extinction or acquisition of rights [634] through lapse of time — lit. 'yearing'] does not seem to be in conflict with this view.

There is no information whatever on indigenous forms of public expropriation of land or water — as it exists, for instance, on Bali (—).

Should anyone wish to learn what Javanese land law is *not,* he should preferably read how the ordinance on mortgage facilities (Sb. 542/1908) imagines it to be.

(—)

Law of Chattels

Matters of debt are called *utang piutang, sambut sinambutan* by the Javanese. As such they are distinguished from matters concerning land. It is not clear whether there is an equally sharp distinction between the law of chattels and the law of wrongs.

As compared with immovable property, movables are still considered much less important by the great majority of Madurese and Javanese people, though this may well change gradually. The major categories of movables are cattle, trees and other useful vegetation, houses (including rice stores, cattle byres, shops) and vessels. Except in Madura and the eastern corner of Java, it is fairly rare for farmers to own livestock. Whereas livestock in West Java consist principally of water buffaloes, in this law area cattle, *sapi,* are the most common horned beasts. The notion that vegetation counts as movable property is one which Java has in common with almost all of Indonesia.

In Madura and Central and East Java the houses stand at ground level. Kangean has houses on stilts, and Bawean has bamboo dwellings on the ground and wooden houses on stilts. The rice store, or *lumbung,* is called *duri* on Bawean; the cattle byre *kandang.* Until recently the ordinary Indonesian had no better idea of what to do with his wealth than to invest it in bullion or unproductive gold jewellery, which was then kept in a strong-box or *grobog.* Changing these habits and introducing all the other things necessary to create an Indonesian middle-class cannot be imposed by regulations, but must be inculcated by the provision of trusted saving facilities and by patient education.

The adat-ownership of movables differs from that of land only in [635] that the latter is often still subject to the higher right of avail of the village. For this reason (—) the content of ownership in movables is practically the same as that in land or beachponds in those areas where the right of avail over them has already weakened considerably.

Joint ownership (e.g. of rice stores and cattle byres) is common.

In contrast to this, village ownership of movable property (—) appears to be as rare as village ownership of genuine village lands (not the so-called communal lands). It applies to the appurtenances of village administration, to the building serving as a place of worship, the village ricestore, and the school building and furniture. Movable property includes many piously endowed (*wakap*) goods: Korans, *kitab* and so forth; as with *wakap* lands, it can be assumed that *wakap* articles, if attached to a religious institution (as they usually are), actually belong to that institution. Also with regard to jointly owned movables, co-owners do not individually have the right to demand the division and sharing out of the property.

Adat-ownership of a fruit tree in the forest (—) is created by appropriation, presumably by making a notch or some other mark on it; in accordance with the right of avail, this is mostly forbidden to members of other villages. *Alang-alang* grass growing wild is appropriated by marking it out (*sawèn*), the long blades being tied together at the corners of the field. Ownership of a tree can of course also be created by planting it. Here, too, alienation (by sale, barter or gift) is effected by the actual delivery of the property, in conformity with the concrete nature of [this kind of transaction].

The alienation of cattle or water buffalo requires, as in Aceh, the co-operation of the village authorities — headman, scribe, or sometimes religious official — for it to be valid. Even today, the small payment, *pesaksi,* due to them for their co-operation, is known everywhere. For a long time, however, we failed to recognize it as an [636] adat levy, regarding it instead as a courtesy payment, a recompense for assistance, or even as extortion. In some places the same requirement applies when the ownership of a house is transferred. In Banyumas, Kedu and elsewhere a buyer of cattle (at stock-markets only?), when making a cash payment, receives back a few cents of the purchase price from the seller, this sum being called *cunduk laris,* the 'bait of discount'.

It is probable, though not explicitly reported, that the betrothal gift or *peningset* is inalienable until the day of marriage. (—)

The fact that land and vegetation are considered by Indonesians to be quite separate has the consequence that, even if a person's right to the land should cease, for example if he abandons it or moves from the village, he retains his right to fruit trees (coconut palms, *arèn* trees, etc.) on land he formerly cultivated (—).

Indonesian trade in movables is very widespread (in Bawean almost every *sawah* owner is also a trader) in an elementary form. Buying up goods in order to sell again quickly is called *kulak* (*kilak*); buying in bulk *tebas, nebas.* Both male and female traders are called *bakul* (Bawean sends out such pedlars to the whole of Central and East Java); cattle dealers are *belantik.*

Everywhere trading takes place on fifth-day markets (*pasar*) at a certain market place in the middle of a particular village complex, and dealings are for the most part cash-and-carry transactions. Cash trading is likewise the rule in indigenous shops or *warung.* At the bigger daily town markets and in bigger shops, Indonesian salesmen are the exception.

Very common is the *bakul* or hawker's contract, whereby goods are given to an Indonesian trader to sell (hawk), on condition that he will within a stipulated time either hand over the agreed price (he keeps any excess), or return the goods, or — it seems — do a bit of both. [637] For this 'indigenous commission contract' (—) the Javanese use derivations of the key-word *kempit* ('to have under the arm', to control), which we came across earlier for fields temporarily under village control; the hawker of goldsmith's wares and other precious articles is called *pepara.* The contract between *bakul* and owner of the goods starts the moment the goods are put at the former's disposal.

In general it can be said — as was revealed already in the section on land law — that in this law area, too, a legal obligation does not simply arise from a bare consensus, but requires the actual transfer of something tangible. Hence, if a person wishes to secure the future transfer of ownership of some movable — for example, the purchase at a certain price of lime or tiles for a Madurese producer who does not have them in stock (cf. the Minangkabau *ijab*-transaction) — he would not, as we would, make a consensual executory sales contract, but pay a 'binder' (*panjer*) to the producer. This sum is not deducted later from the purchase price and its significance lies in its binding power. The usual translation of it as 'deposit' is particularly misleading in cases where a unilateral written statement is accepted as *panjer.* A price paid in cash is called *kencèngan*; if the entire price is paid in advance the Javanese call it *tempah.* Naturally no artificial 'binder' is required if the article itself has been delivered but the payment of the price is delayed: such a credit sale appears to be called *pinjem,* at least in Java's eastern corner, where the word is said not to have the connotation of borrowing. (—)

Pawning of movables appears to be known mainly as security for debts and is mostly of jewels and other articles of value, seldom of cattle or agricultural implements. The paucity of data may well be connected with the Administration's prohibition on taking movables as security for loans under a hundred guilders. (—)

[*638*] Half-sharing or other profit-sharing is widespread, especially in respect of livestock (cattle, horses, poultry), and apparently particularly common in Java's eastern corner and on Madura. One variety is *angon janji paruan anak,* the agistment of livestock subject to half-shares in their progeny. Only the basic rules are certain: the contract starts with the actual transfer of the animals; in the absence of special conditions and with uniparous beasts, the first-born is for the caretaker, the second for the owner (sometimes the other way round), and so turn and turn about. With poultry, half the brood goes to each party, and where the number is uneven, the extra one is for the caretaker. If an owner takes back his animal before it has reproduced, the caretaker must be compensated, unless he has already received sufficient benefit, for he can work cattle or horses as long as they are not harmed. The liability of the agister is presumably — as in the case of custodianship — stricter for loss by day than by night, and stricter if the agistment was at his request, than if it was mainly for the benefit of the owner. Fixed rules as regards legal presumptions and the burden of proof are lacking; moreover, since these cases are in practice endlessly varied the intervention of the court (—) is regularly sought — and rightly so, for this is genuine Indonesian practice — to determine how adat law ought to be applied in this or that particular case.

Very widespread — in fact, too widespread — is the practice of borrowing money or produce (rice, seeds, etc.) for consumption, or borrowing money against future repayment in rice (e.g. one guilder for one *pikul padi*), and indeed borrowing of all sorts of goods. The practice is the more serious because the ordinary borrower will in his [*639*] turn lend what he has borrowed, and usually only understands his duty to be the payment of interest if necessary, not the repayment of the capital debt. On account of the prohibition of interest in Moslem law, which is observed in most cases, usually more is repaid than was lent. The contract becomes binding when the loan is put at the disposal of the borrower. To the Javanese (and Madurese?) the loan of rice is different from the loan of other chattels, and this is sometimes reflected in the vocabulary used. Borrowing in general is called *silih* (*sambut*) or *selang*; possessing something on loan is sometimes called *gaduh,* the

same term as is also used for holding land under a tenancy at will; *pinjem* seems to mean something else in Java's eastern corner (p. 200). Contributors to village or parish rice stores have the right to borrow seed-*padi* from such a *lumbung*. With normal loans to Indonesians the lender is often Chinese. Before the general use of money, borrowing between Indonesians often took the form of reciprocal loans of goods (*silih-sinilihan*); and even nowadays borrowing on the basis of reciprocal aid is still known, in the sense of lending for nothing so as to be able to borrow for nothing later. In 1916, regulations were made against usury.

Hire (*séwa*) of movable property occurs in respect of carts, vessels, *gamelan* instruments, plough-cattle; seldom in respect of Indonesian houses. Rentals may, besides money, be paid in kind, for example, rice. Livestock can be hired out by their profit-sharing caretakers or agisters as well as by the owner. The contract becomes binding by the handing over of the animals; an agreement for future hire is made binding by means of a *panjer* [material binder].

Custodianship (*titip*) merely as safe keeping is seldom mentioned, but the type of arrangement under which the caretaker works to ensure that the property does not deteriorate is very common, as with farming-out livestock (*titip*, or *anggaduhaké, tètep, nèteppaghi*). The man with whom the cattle are placed is rewarded for his trouble — if the use of the cattle is not sufficient recompense — either by receiving one or more calves over a specified number of years, or *padi* or money. A form of perpetual custody, whereby cattle are taken back only temporarily whenever the owner actually needs them, is also known. The [*640*] caretaker may use the cattle in his custody, and may even let others hire them for light work in the fields. (Do custodians of other types of property have a similar competence?) The village, by virtue of its right of avail, receives a recognition payment (*pebuntut, pamesi,* etc.) from the cattle owner. The caretaker's liability is, at least in Kediri, stricter for loss by day than by night (in the latter case only a part of the value must be made good), and is reduced or waived completely, at least in Pasuruan, if the caretaker gives notice of the animal's sickness in good time.

Finally, among the important transactions under the law of chattels the cropping lease and the advance sale of crops must be mentioned. They both relate to crops standing in the field, ripe or green. By crop-lease or *tebas, panebas,* is meant the right to reap someone's crop or fruit trees, either in whole or in part — e.g. as much as the 'lessee' can

carry — against payment of a certain sum of money per *bau* (p. 186) or per tree; a transaction wich in colloquial Dutch and German is often called *verpachting* (leasing: rye or clover *verpachting*; *Obstpächter*). The same contract is found (also with the name *tebas*?) in respect of emptying another's fresh water pond of fish. Whether the contract is initiated with a *panjer* is not clear; the terms *ngedol tuwa* [old, ripe] and *ngedol kuning* [green], which are used for crop-leases, suggest the surrender of the crop. Fixing the price per *bau* or per tree places the risk of crop failure on the 'lessee'. Chinese wholesalers therefore seem to prefer an agreed price per *pikul* [shoulder load]. *Tebas* is especially common in Java; the term *tebas, nebas*, is used for every transaction involving goods in numbers or bulk.

The advance sale of crops, *ijohan, ijon* or *ijeman* (from *ijo* or *ijem*, green, unripe) is a different thing. Here money is paid in advance to the crop-owner at his request — so many guilders per *bau* — in return for which he undertakes to repay the creditor with the equivalent value in crop ber *bau*. The creditor appears to share the crop risk to some extent, because he does not get back more than a specified *bau* produces; yet in the event of total crop failure he apparently still gets a [*641*] quantity of crop borrowed or bought for the occasion. In assessing the information on the frequency of this transaction, which is also known in Bali, one should bear in mind that the Administration — as the people are aware — considers it a bad thing and has prohibited it (—). There is no mention of a creditor's right to help himself to the crop.

Nebas and *ngijo* differ, in the first place, as to who actually does the harvesting: with the former it is the lessee, in the latter the cultivator. They differ further as regards motive and as to who actually initiates the transaction: with *nebas* it is the buyer's need for rice; with *ngijo*, the cultivator's need for cash. And they differ once again as to subject matter: in the first case, the ripe or ripening crop; in the second, the harvest in the distant future. *Ngijo* and the loan of money against subsequent repayment in rice differ also in this respect, that the lender of money against the promise of rice bears no risk whatever, is not concerned with where the promised rice is to come from, and therefore lends the money before there is any question of crops. Nonetheless, also this way of lending money is sometimes called *ngijo*, and in both cases the delivery of the produce seems to take place at the rice-store of the farmer, not on the field. All these transactions often involve a Chinese on the one side and an Indonesian cultivator on the other. The

peculiar meaning of *empingan* for advance payment is not clear: *empingan* is probably the generic term.

The law of chattels further covers a number of transactions not related to tangible things. Here, too, one must keep in mind the communal character of Indonesian society, which is not felt to be composed of independent individuals, but where co-operation in village communities and smaller groups (by virtue of the mutual assistance arrangements to be discussed later) still prevails.

Among such other transactions is the relationship of landlord (*majikan, dunungan*) and lodger. The description of the social classes of a village made it clear how common this relationship is: the lodger either having his own dwelling on the landlord's residential plot, or living in [642] his landlord's house. The landlord bears the maintenance costs of the residential plot; the lodger is obliged to help the landlord, not with regular cultivation activities — though naturally a *bujang* [bachelor] lodger may be engaged for that very purpose — but with all kinds of services in and around the house *(sumbang surang* or *tulung*), and with the initial reclamation of virgin land.

The number of different forms of agreement under which labour is rendered to others is fairly large, and most of them we would call service contracts. The highest form of service is that of practitioners of trades which used to be famous in Java, such as gold- and silversmiths (*kemasan),* coppersmiths and the like; or *dalang,* the prestigious performers of *wayang* plays. Much lower in scale is the equally skilled work of female dancers. The cultured Javanese will dance himself, but he also has dances performed for him: by *serimpi* and *badaya* at court (in permanent service), by *tukung jogèd* in private homes, and by *talèdèk* (*ringgit*) and *ronggèng* in public. The services of indigenous doctors (*dukun,* whether men or women) also belong in this category, as does the paid work of wet-nurses and the like. Besides these, there is the widespread practice of contracting labour for agricultural tasks: preparing the land for planting, sowing, harvesting and so on. Casual agricultural jobs include cutting *padi* (mainly done by women) for a daily cutting fee (*bawon*) equivalent to a fixed proportion of what is cut — i.e. piece-work — either in rice or money. In the case of a cropping lease (above) the cutting fee is usually money, because the creditor-harvester is mainly interested in the produce. Casual labourers are called *bujang* or *kuli.* There are also haulage services with waggons or *grobag* (Java has a long established tradition in these); as for Madura and Java's north coast, sea transport services should be

mentioned as well. Herding cattle or ducks is also regarded as casual daytime employment, the former always by young boys, *bocah angon,* the latter usually likewise by children. Anyone with young sons, adopted sons or young nephews has this work done by them as part of their duty to render him services.

[*643*] How are legal obligations created in these cases? Between good acquaintances — thus often between fellow-villagers — everything is done by verbal agreement and in good faith. With Indonesian strangers, and even more with Chinese, Arabs or Europeans, a material binder is necessary; and only then does an enforceable obligation arise.

In contrast to all these forms of casual employment there is permanent wage-labour, which is of far less significance than in western society, because of the duty of relatives and lodgers to render service, the mutual and reciprocal assistance of village members, the share-cropping of land, the agistment of cattle, and so forth. The permanent wage-earning farmhand is called *buruh (berah)*, which sounds better than the rather coarse term *bujang.* He is usually an unmarried or recently married man who boards with the farmer, receiving as payment (*opah*) either a fixed amount in money or rice, or a share in whatever has been harvested. Headmen also employ people in permanent service, besides those whom they can normally call up for duty.

Whether sailors come into this category is doubtful (—). Theirs is often a special case. Sailors (*pandéga*) on the merchant ships from the island of Sapeken in the Kangean archipelago do not serve for wages, but receive goods (what kind?) from their skipper (*juragan*) to sell for a minimum price agreed in advance. Whatever they get over and above that minimum they may keep for themselves: a kind of hawking on consignment which calls for their performance as sailors as well. Elsewhere, too, sailors on Indonesian vessels are regarded rather as business partners than wage-earners — something totally different therefore from Indonesian sailors on European merchant ships, who are subject to the provisions of our mercantile law (—).

Though juridical information on shipping is on the whole scarce, one finds here and there reports of practices aimed at making sea-fishing profitable. The sea fishermen of Bankalan in Madura normally [*644*] sell their fish while they are still at sea to dealers who come alongside with their boats (*prau ngadang*). Sometimes the buyers appear to pay for a proportionate share of the anticipated catch, that is, before the parties know whether it will be large or small. On the island of Sapeken in the Kangean archipelago the wholesale dealer

advances business capital to the fisherman, mostly in the form of rice valued above the market price; the fisherman is in turn obliged to deliver to him all the fish he catches and dries at a price below the market value; the profitable difference between the two calculations constitutes the dealer's interest on capital and his entrepreneurial reward. As long as the fisherman is in debt to the dealer, as he is almost perpetually, he regards himself as the other's subordinate — a quite different relationship and transaction, therefore, from that of fisherman and fish dealer in Aceh.

Incidental expense-sharing transactions also occur. One reads, for example, of jointly (*brandon*) building and financing small irrigation works, and of jointly transporting goods in one and the same cart. Because of the prevalence of Indonesian forms of reciprocal aid — see below — this is actually very seldom necessary.

Something similar is true of individually initiated long-term activities with shared expenses in the form of a partnership or other association. This can involve the pooling of labour just as much as the pooling of money and property. The Javanese word for long-term partner is *baton* (lit: dish-mate) or *sakutu* (lit: oath-fellow); that for the association itself — as a company or merely as an enterprise — *bebaton, patungan,* or the Arabic-Moslem *sarikat* or *sirkat* (—). Although such Indonesian associations are beginning to thrive in Java, information as to their establishment, aims and legal consequences is still scanty. Sometimes one reads of a society which exacts a '*panjer* or entrance fee', an entirely Indonesian concept in spite of the misleading translation. It will undoubtedly become clear before long that we are on the wrong track with misconceived creations like the decree of 1916 on *[645]* co-operative societies. It would have been better to learn from Bali, where voluntary associations are old and richly varied. (For legal personality of new forms of associations, see p. 155).

Commissioning an agent or deputy (*sulih, sulur*; or — Arabic-Moslem — *wakil*) is an extremely widespread practice, yet information about it is scanty. In the folk-concept the agent even represents the principal in what we would regard as strictly personal matters, such as giving evidence. Examples are: appointing an agent to exercise the rights and fulfil the duties of a land owner, appointing an agent or deputy to fill an office, using an agent to sell something, or commissioning a *bakul* to buy something at an agreed price (the agent himself will have to buy at a lower price), and so on. Nowhere is it stated that a material binder is needed to establish a binding relationship.

Dice and betting are also widely known. The latter includes betting on cock-, cricket- and tiger-fights, and undoubtedly also on the bull-races of Madura and Besuki. The deposit paid by the leader of the dice game is called *bratu,* the stake *wudu* or *urun.* The *Staatsblad* No. 306 of 1907 made all claims arising from gaming and betting unenforceable in government courts.

Information on suretyship is scarce. The relationship is not unknown, for in both High- and Low-Javanese there is a word for it, namely *nanggung* (High-Jav.: *nanggel*) — from *tanggung* (*tanggel*) — and *nangghung. Tanggungan* or *tetanggungan* is the person for whom one stands surety, *penanggungan* is the surety itself. That the obligation becomes binding upon bare agreement is unlikely. The way in which suretyship works is not explained anywhere. Forfeit of surety, resulting in the surety's personal servitude, disappeared when the voluntary servitude of debtors (see below) disappeared. Collective surety in the style of the Sundanese *tanggung rèntèng* ('standing surety in a row') has come into prominence because of the recently instituted farming credit; the sureties are in that case jointly liable.

[*646*] Among the obligatory contributions arising from adat law itself must be counted bridal gifts at weddings (above) and similar gifts at other celebrations. On Bawean all guests bring cooked dishes with them to the marriage feast held at the house of the bride, so that there need be no cooking there, and they often collect some coins for her during the celebrations. Of more public significance are the contributions which all core-villagers, perhaps also the other *désa* members, bring to the annual village feast after the rice harvest (*sedekah bumi, bersih désa*), and to the celebration of sowing the rice and other sacred village meals. Such contributions (in rice, fish, fruit, etc.) are called *sorogan.* They are required for the religious services etc. which accompany a village funeral (funeral rites are *selawat*; the contributions *urun selawat*). (—) The donation of obligatory gifts is called *tulung-tulung* [collective help] on Bawean. Scattering money at funerals — the strewn money being called *sawur* — seems to be more a matter of social decorum than a strict obligation. Whether the word *balesan* for a counter-gift indicates an obligation to reciprocate is not clear. (—)

In the discussion of village institutions it was clear how firmly entrenched communal aid between villagers still is. It is a moot point whether we should sweep away this popular custom for being non-western, or whether we should guide it in the right direction. Whereas

under western law legal acts are performed either as a *quid pro quo* or for nothing, in adat law they can also be done against the certainty or expectation of some future reciprocal service. This far-reaching and remarkable institution of collective aid (or service), which mostly consists of providing some labour but can equally well involve, for instance, the loan of rice or helping out with a cart, is found in this law area in each of its four Indonesian manifestations. First, in its old-fashioned form of communal aid it is rooted in adat law itself, requires no explicit agreement or arrangement, and is based on the mere fact that the parties are fellow-villagers. It is this kind of assistance which is interwoven or coincides with the duty of rendering [*647*] *dêsa* service. It involves work in the fields of fellow-villagers and help with building or repairing their dwellings, as well as interests directly concerning the village, such as taking care of annual festivities, the headman's house and official fields, and his domestic and official services (sometimes also in respect of other members of the village administration). People are, if necessary, called up for this sort of work by the village messengers or *kebayan* at the behest of the village authorities, and rewarded with food and delicacies. Occasionally the village headman, through his own dependants, participates in this communal service; and now and again it extends to one or more neighbouring villages. This compulsory communal aid has many names: *kuduran, uduran, pengresaya* (from *resaya*), *sambatan, sambat-sinambat*; perhaps also *lebotan,* to relieve one another; but probably not *tulung tinulung,* nor *utusan ajek,* and certainly not *jak-ngajak,* 'inviting each other'. Does its sanction lie in the fear of becoming *isin* (being shamed, *malu*)?

Secondly, there is reciprocal aid, whereby a person requests all his fellow-villagers to come and help him of their own free will but in the expectation that there will be reciprocity: for example, with the preparation of arable fields or fish ponds; and also because of the fear of venturing alone, or with only a few people, into the forest. Likewise, on Kangean, reciprocal aid is enlisted for harvesting the ripened rice, whereby a man must reciprocate the service of who has turned up to help him cut *padi,* either in person or by sending a substitute from among the members of his family. Whatever number of invited helpers appears, the same number of days must elapse before he can make a second request for assistance. The fact that this reciprocal aid is referred to by the same term as the first-mentioned communal aid — albeit with inevitable local variations of meaning —

has caused the difference between the two to be overlooked.

Thirdly, people recognize the same kind of reciprocal aid, but this time restricted to a circle of relatives or close neighbours — as with the loan of all sorts of things.

And fourthly, there is collective aid without the expectation of reciprocity [on the fields of well-to-do people] similar to *mösöraya* in Aceh (the term *söraya* is the same as *resaya* in Javanese). All these forms of collective aid have in common that they are rewarded with food and refreshments while the work is being done, and in the case of [*648*] prolonged work, with a treat at the end.

More and more often, besides all this collective aid, individual enterprise is gaining ground and, in pursuance of this, independent co-operative forms, such as joint undertakings with expenses shared, or even enduring partnership. Yet the *mapalus* [work parties] of Minahasa show that even the oldest Indonesian form of collective aid still has a part to play in already well developed communities. (—)

If we now review the law of chattels in this law area, we recognize in it again the five characteristically Indonesian features: (1) it is still only just on the way to becoming individualistic; (2) all legal relationships are conceptualized or executed in a concrete fashion; (3) only the main outlines are laid down, with further refinements and presumptions lacking; (4) for the classification of all these transactions, their motivation is vitally important; (5) general theories as we know them are lacking, and a need for them is not felt. To each of these five points a note may be added.

The non-individualistic, communal nature of this society is clearly expressed in the forms of rendering aid described above. Not because some ordinance prescribes it, but only through the development of individual initiative will this communal aspect recede into the background; let us take care not to lose the beneficial part of it.

The concrete element shows itself in two ways. First, it seems that the subject matter of a right must be a tangible thing. Conceptually, therefore, property does not include debts due, or rights to claim; it concerns material chattels the use of which one enjoys on the basis of their being owned, leased, loaned, pledged, and so on. Movables are therefore transferable on the basis they are to be enjoyed (even those in safe-keeping); on the other hand, rights or duties of an essentially personal nature (mandate, suretyship) cannot be transferred. The right to redeem a pledge is only the reflex of the enjoyment of the pledged thing, and sustained because of the reality of that enjoyment. The

second manifestation lies in the tangible token or binder (*panjer*) which is necessary to turn bare consensus into a binding agreement.

The lack of detailed prescriptions was clearly evident in the case of profit-sharing. Giving up the traditional freedom of Indonesian judges [*649*] for premeditated case law would not improve matters for the litigants themselves. Instead, what is highly necessary in the economic interest of the population is that the parties themselves should define their respective rights more precisely beforehand. An institution like the farming credit system is a powerful aid in this direction; and it seems essential to have Indonesian public notaries, partly because of their educative influence.

The importance of motivation in the Indonesian classification of legal transaction must be respected by us westerners. By presenting a cropping lease as the sale of a future crop, by identifying the advance payment of crops with monetary loans against *padi,* by construing a hawker's commission contract as a suspended sale, or a profit-sharing arrangement as a partnership, we make the transaction as incomprehensible to the Javanese as it would be for our jurists if sale were to be subsumed under barter, or marriage classified under the law of contract.

Finally, the lack of general doctrine seems worse than it is. In practice there is no need at all for rules about divisible obligations, joint liability, novation, remission of debts, and so on. The extension of the date on which a debt falls due, but at the price of more onerous terms than before, is all too common in practice, yet needs no special rules. Place and manner of payment can be left again to the contracting parties, and the Indonesian may be spared our obscure rules on default. Prescription of debts is unknown, and the consequences of breach of contract are left for the court to decide. Probably we could devise some useful new rules, but these should be strictly confined to what is really needed (—). It should be remembered that sale, barter, and gift do not confer a right to claim transfer, but *are* actually ways of transferring adat-ownership.

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Law of Wrongs

[*650*] During the course of a century of government justice — which even before [the Native Criminal Code of] 1872 [5] barely recognized adat penal law — the law relating to impermissible conduct has changed beyond recognition. Only here and there can one still detect a

little of the old folk concepts which ought to have been kept alive by the regional court advisers.[6] It should be realized however that such concepts included what westerners would regard as civil wrongs. As Javanese terms for actionable wrongs, at least for a punishable wrong, one finds the synonyms *kedursilan* and *kedurjanan.*

As adat wrongs (taking the term in a broad sense), apart from the obvious ones like murder, robbery, theft, incest, adultery, etc., the following are especially noted: breach of a binding betrothal, unauthorized appearance as an Islamic solemnizer of marriages, infringement of the right of avail of another village, theft of water (infringing someone's ownership of irrigation rights), theft of cattle (easy and common), theft of wild fruits at night (a serious wrong), and so on. In addition, there was and is an elaborate village penal law relating to all kinds of minor offences against the *dêsa* order. This penal law, being adat law, ceased to be officially recognized after 1 January 1873; but in practice it is allowed to remain as a disciplinary code, its implementation being left to the village authorities. Likewise, the Christian communities define their own delicts, with corresponding disciplinary sanctions. Not considered punishable or only regarded as a minor wrong is the killing of a thief of field produce at night (the culprit, for fear of being misunderstood, will often tell our courts that he thought it was a wild boar). Precisely because adat wrongs also include actionable wrongs under our law — the court will have to decide in borderline [*651*] cases whether to exact punishment, compensation, or both — the list of these wrongs is not exhaustive.

Self-help (taking the law into one's own hands) is not condoned if the accused could have turned to the authorities, or if his retaliation exceeds reasonable bounds; but, for example, anyone seeing his preferential right at some lonely place in the forest being infringed would be acquitted if he forcibly ejected the trespasser. As regards the application of the law of wrongs by our civil courts, a century of government justice does not appear to have shed much light. Instead of treating prohibited self-help in *sawah* matters as an adat wrong, it was muddled up with the question of the right to the field and dealt with after the fashion of proprietary actions under the Civil Code.

The legal remedies for adat wrongs comprise the restitution of property, single or multiple compensation (*ili-ili, ilènan*), formerly a fine or death, sometimes also corporal punishment. During the Javanese era the ruler usually reserved for himself the power of capital and corporal punishment, and such cases often came before the

religious judge. Examples of *désa* punishments are: some extra days of communal service, temporary prohibition of the use of a field, prohibiting a person from becoming a member of the village authority, and requiring the offender to pay money. Examples of punishments in mission communities are exclusion from communion or from taking part in other community celebrations. (—)

The liability of the village for wrongs committed on its domain by persons unknown or uncaught — either for all kinds of wrong, or only in cases of murder and theft — can probably be deduced from the boundary disputes and the readiness to give up pieces of land if a corpse had been found in the *désa* forest or upon the discovery of theft. The Government, whose Criminal Code eschews such liability, has in the Besuki district since 1904 nevertheless made the whole village responsible for grass fires, the penalty being additional compulsory heavy labour. (—) In the same district neighbouring villages are also held liable for cattle thieving. It is not certain whether parents [652] are liable for all or some wrongs (theft of wild fruits, etc.) of their under age children.

Legal Remedies

It should be stressed first that in this law area, as in the rest of Indonesian adat law, there is no separation of real and personal actions. The court is simply asked for legal redress, and it depends on the circumstances of the case — e.g. if another man's land or movable property has been sold — whether it will order the restitution of the property itself, or some other form of reparation, as long as the matter is resolved for all parties. (—)

Public shaming (*isin*) of a fellow villager is also here a powerful sanction against many trespasses. Total ostracism makes life for the victim virtually impossible in his own village. Actual banishment from the village has not been reported.

The contravention of *ila-ila* or ancestral institutions (*ila-ilané wong kuna*; *sangker* or *waler*, 'prohibitions') is certain to be punished by supernatural disaster (*cilaka, bilahi*). Trespassing on or spoiling land or other property which is *angker* (taboo) will also bring supernatural retribution. To be under ancestral prohibition is called *buyut*. To enclose (*nyengker*, from *sengker*) property, or to deny access to it by a prohibition sign (*gawar*), is probably also sometimes sanctioned by the fear of supernatural harm.

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CHAPTER VIII

THE MAINTENANCE AND DEVELOPMENT OF INDONESIAN ADAT LAW

[April—December 1926]

1. *Voluntary Observance of Adat Law; its natural growth*

[233]* Adat law exists in rich variety among the Indonesians and foreign orientals of the archipelago. Its content used to be different, and it is still steadily changing. What has made it a binding law? What forces have permitted or encouraged its development?

The jurists of course have a pat answer: in case of non-compliance, adat law, whether old or new, is forcibly sanctioned by government or indigenous courts. This view finds support in our system of justice. (—)

This explanation for the continuance and change of living adat law is not in accord with the facts — which is fortunate, for if adat law could rely only on the pronouncements and the power of our courts, little would remain of it.

In the first place: the arms of our judges are short. Consider how countless the legal disputes must have been among these millions of people in the eighty years since 1848, and how pitiful, in many regions, [234] the number of civil suits brought before our courts. There are, or were, *landraad* courts in Java having only a few dozen civil cases each year, and government courts in Borneo, with jurisdiction over Malays as well as Dayaks, which would go for years without seeing a single Dayak. In parts of Java the population systematically avoided the justice we dispensed, and, unaware that the *landraad* is a civil court, would ignore it in dispute over contracts.[1] Let us recall how lamentably small is the number of published adat cases: five hundred or so after eighty years in a population of thirty to fifty millons.[2]

Apart from this, the pronouncements of our judges are often inexpert. In June 1919, the Director of the Department of Justice wrote candidly to the *Volksraad* [3] that academically trained lawyers had no useful part to play in administering justice to natives, for 'adat institu-

* [Marginal page references are to Vol. II of the original.]

tions are involved, in which lawyers are not at home'. Even the Indonesian headmen in the regency or district courts are often far from well informed about the adat of the village folk, and will sometimes try to follow the wrong kind of example from the government courts. Also administrative officers involved in government or indigenous justice, though often surpassing professional judges in concern for and knowledge of adat law, have repeatedly done violence to it. Consequently, few of the published adat decisions can be held up as models. (—)

[235] Does this mean that formal jurisdiction is of no importance for the validity of adat law? Certainly not. Nothing could be more beneficial for the maintenance of adat law than a coherent series of judgments which explore, understand, and uphold this law; nothing could be as disturbing as haphazard and arbitrary decisions. But if adat law and the courts should diverge in their paths, adat law would not be vitiated, for its main strength does not lie in the words of a judge, but in something else. (—) This argument can be substantiated.

First, the Islamic courts (council of priests, etc.), have for centuries been maiming the adat law of succession and ignoring the betrothal gift and adoption, without, however, ridding the living adat law of these institutions (pp. 136f., 167, 170). Secondly, many rules of adat constitutional and other law have remained operative though hardly ever coming before the courts. Thirdly, when statute law requires the courts to deviate from adat law, the legislator is himself admitting the dualism of popular law and judge-imposed law: for example, the last words of section 75(3) *Regeringsreglement*; the 1907 Ordinance against claims arising out of gaming or betting; and the 1916 decree against usury. Finally, judges sometimes do have a discretion in their choice of rules of law: for instance, the rules of adat procedure, which the court, whether government or native, may choose to follow or not; and the form of marriage between Moslems, the validity of which depends [236] on recognition by the religious judge.

This is enough to show that the law of the government courts, of the *rapat* or *musapat* tribunals, and of the religious *surambi,* need not be identical with the law of the countryside, the market place, and the home, and that the latter must have its own sources of authority, outside the courts of law.

Discovering this should not take long, for the fact of course is that, like people everywhere, foreign orientals and Indonesians alike conform to their adat rules, willingly, with conviction and in good faith (—).

But what makes them observe these rules so loyally?

Four motives must be considered: they are accustomed to do it from childhood; they are in awe of their ancestors; they tend to defend their own interests; adat institutions are usually passed from mouth to mouth.

a) The first motive needs no explanation. Even in the most highly developed societies, thousands of things are done the way they are because of childhood learning. It is not necessary to relate this to the 'herd instinct of primitive peoples', although it is certainly true of backward peoples and areas, that 'to bear up against public opinion is notoriously the last thing of which the savage is capable' (Marett, 1902:92). The adat law relating to courtship and marriage, to the gathering of forest produce within certain boundaries, to loans of rice and money, to mutual aid, share-cropping, bridal payments — all of this law is full of rules in which 'this is the way to do it', 'this is allowed', 'so it ought to be', coincide. Although never laid before a judge, or backed up by case law, these rules are as firm as a rock, simply because everyone knows them and respects them (Wilken, 1912, II:384). Only if a person attempts to break their magic bond is the court called in — but then its word is decisive.

[*237*] What sanction lies behind this conformity inculcated from childhood? Fear of scandal (Holleman, 1918:432, 1920:398), of being thought a fool, of being shamed or laughed at (*malu, isin,* pp. 117, 212 above), a desire for what Indonesians call 'coolness' (—).

The bluster of *totok* [westerners] will leave an Indonesian cold (even though slanging matches are known in the Moluccas); a reprimand in the presence of others will make him vengeful or impudent (Nederburgh, 1919:189*n*); but ridicule from his own group, especially if it takes the form of subtle mockery, is virtually irresistible. For the administration of justice this fact has the significance of showing how everything is known about everyone in the intimate sphere of village life (—), which is a great advantage for the indigenous village justice, and sometimes enables a government court to strike a wealth of evidence just by changing its venue to the scene of dispute. This is much less so in the towns, of course, and for many dispersed Indonesians; and it applies to foreign orientals only when their way of life has something in common with the Indonesian.

b) The second motive mentioned — and it, too, can be instructive for government courts — is the awe of the people for their ancestors (—). The ancestors do not appear in the same light everywhere. In heathen districts they are deified, their souls or spirits being identified

with gods, and among the Chinese too, their worship amounts to deification; but in Hindu, Moslem and Christian areas people take a less extreme view (—). It is not reported whether the Balinese house-temple gods are ancestors. In Aceh, ancestor worship appears to have [*238*] disappeared or diminished; among peoples with bilateral descent, such as the Toraja, it very often extends to males and females alike. The *Nāgarakṛtāgama* epic (1365 A.D.) of Java has a funeral meal in honour of the ancestors, the *çrāddha* feast. In Java, where the dead (even those without issue?) are worshipped from a thousand days after death, the custom still exists of visiting the ancestral graves to ask permission and blessing (*nyuwun pengèstu*) before some important undertaking — circumcision, marriage, pilgrimage to Mecca, departure for advanced study in Holland. The request is not in words alone, but flowers and incense are respectfully offered. But this is one of those matters on which they do not, without necessity, confide in the 'enlightened' European.

As has already repeatedly become apparent, the adat law of the Indonesians and the Chinese is the adat of the ancients, of the dead. It is the complex of legal customs on whose observance (like that of the other customs) the ancestors fix a watchful eye: *ila-ilané wong kuna, adat poyang,* the customs of the ancestors, the voice of the forefathers (—). They still keep their hold on life on earth and wish their adat to be observed, not only the various mystical prohibitions (*pantang, pemali, buyut),* but also the laws relating to authority, the land, and family life. Non-observance provokes their curse, the curse of the gods: the *kena sumpah poyang* of southern Sumatra. In Minangkabau, it would violate the oath of the ancestors (*sumpah satië*) if a person not belonging to the village community were to buy village land (Van Hasselt, 1882:305). Sometimes the ancestral curse strikes only the actual violator, but sometimes his entire village or clan, or his special oath-partners, are affected.

[*239*] A whole series of consequences follow from these beliefs. A European who wittingly or unwittingly violates things dear to the ancestors — a sacred tree or patch of grass — will often pay for his crime by being poisoned, for complaining to the Administration or the law court would not help the people.

With offences which expose a whole village to ancestral anger it is not enough to punish the offender. The village must be cleansed of guilt, for instance by sarcrificing a buffalo, chickens, rice, eggs, flour: the *membasuh kampung, menepung* (*tepung*) *tawar,* lit. 'the sprinkling

with flour', such as is still done to those about to be circumcised (Wilken, 1912, I:697). Our regulations for the indigenous administration of justice and our taxes on the slaughter of beasts often take account of this (—).

Official and state regalia are filled with ancestral power, and the ancestors protect and support the wearers. The most striking examples are those in which the ruler personifies the ancestors, both as an authority to be venerated and as the defender of adat, as with the divine kings of Hindu times, or the divine Batak and Luwu rulers (—). Similarly, the Buginese-Macassarese state fetishes receive the worship accorded to ancestors, and fulfil the ancestral duty of preserving adat. (Hence, probably, the name *ada'* or *hadat,* as used in South Celebes for the councils composed of the guardian of the fetish and high state officials. Here, the fetish itself and the head of such a *gaukang* state [p. 50, above] are venerated and propitiated, sacrifices being often made to them, and their blessing is invoked should the crops do badly; even the idleness of the divine ruler is admired rather than criticized — Wilken, 1912, III:134-40, 207-8; Adriani and Kruyt, 1919:130-1.)

These examples make it clear that one cannot abolish a fragment of adat law as one would a municipal police regulation, and that there is more to adat law than utility and logic. This is borne out on the one hand by the Balinese manner of 'legislation', and on the other by the idea the Indonesians sometimes have of the origin of their adat.

Legislation in our sense is unknown in most law areas. Yet it [*240*] developed on Bali, where it found expression particularly in village regulations and those of irrigation societies, which are preserved in *désa* and *subak* archives. These were formerly either approved by a charter from the princely ruler — thus implying his promise to honour their terms — or laid down by the ruler himself upon request. Is their authority now dependent on the will of the living; are they considered to be better if they are of more recent date; does their legal force rest on secular sanctions only? To the contrary. All of these laws are regarded as 'ancestral adat, to which more value is attached than to anything else in the world'. The counsel and assistance of the gods are sought when the laws are written down and when they are amended. Wrapped in white cloth and kept in the village temple or irrigation shrine, they are preserved as sacred writings containing 'a part of the adat, which is of divine (i.e. ancestral) origin'. They are consulted — preferably in the village temple — after sacrifices, while the *gamelan* plays, and 'the gods' do not permit all and sundry to inspect them.

When put away again, the members of the village or irrigation society concerned swear to observe them, invoking curses upon their own head should they fail to do so (Liefrinck, 1890:329-39). None of this has anything to do with their Hindu religion; it is most intimately connected with their belief in divine ancestors who protect adat law.

It is not surprising, therefore, that people in other parts of Indonesia should describe their adat law as having been decreed on a particular day by named forefathers, just as the Ten Commandments were proclaimed by Moses.

The most celebrated of these popular traditions is the Minangkabau tale of the two legendary lawyers, sons of one mother, who made a political testament proclaiming the adat law. The one, Datuk Kyai Katumangguangan (representative of the moiety Koto-Piliang), is regarded as the conservative one, the founder of the 'religious laws'; the other, Datuk Papatiëh nan Sabatang (representative of the moiety Bodi-Caniago), is the visionary, the author of 'popular customs and institutions', of local adat law (matrilineality, the *suku* system, etc.). What they proclaimed are still the traditional 'inherited' adages (*kato pusako*), representing the ancient but still valid adat law (sometimes called *'adat nan isti'adat*).[4]

[*241*] Admittedly, it would be unreasonable to look for history in such tales, or to open an account of adat law with them. Nor would it be reasonable to see such legendary legislation as explaining the differences between the adat law of Minangkabau and of, say, Melaka or of the Malays of Borneo. But they deserve full attention as illustrating the Indonesian way of thinking and seeing things.

But how, in Indonesian or Chinese thought, is this 'adat of the ancestors' to be reconciled with the gradual transformation of adat law, with the addition of new adat law or — as the Minangkabau sometimes call it — adat that is 'made' adat (*'adat nan di'adatkan*)? It should be said first that any actual repeal and replacement of the adat of the revered ancestors is incompatible with the indigenous view. *'Adat nan di'adatkan* therefore does not mean the making of new adat law, but rather the adding and elaboration of details, local interpretations and decisions on how to apply the traditional adat in particular cases. Adat law changes through force of circumstance. In Jambi, this process of growth is expressed in a fourfold image: the long-forgotten adat is something hidden in a tomb; the obsolescent adat is a field of stubble left waste; the fully flourishing adat is the example which is regularly followed; and the newly developing adat is a fresh shoot

sprouting from a stump (AB V (1912):223; cf. Snouck Hurgronje, 1910:26).

The indigenous authority charged with preserving the adat of the forefathers has to ascertain — just like our judges — what is done in concrete cases. This work is comparable with the task of applying immutable Calvinist doctrine or immutable Islamic law to the richly varied problems of modern life. If the old adat specifies rates of [*242*] payment (water buffaloes, goats, chicken, cloth, etc.) and if the value and availability of the goods have changed, other things may be subsumed under the unaltered adat scale of payments. If adat law forbids a girl to marry before her elder sister, in the belief that she would prove barren or be ill-fated in some other way, the practice develops of marrying off the elder sister to a very old man or to a child, and of dissolving her marriage at once by repudiation. At a later stage, it may become customary to make an offering to appease the ancestors. If in Minangkabau, at least in the borderlands, the custom gains ground whereby a father leaves a part of his estate not to his matrilineal kin but to his own children, the traditional legal maxims are sometimes interpreted as forbidding this as far as wet *sawah* fields are concerned, but not as regards shifting *ladang* fields and money. Here, personally acquired property (*harto pancarian*), originally subject to the will of the future inheriting family, is so no longer. In Aceh, the indigenous bridewealth and the Moslem marriage gift have fused; among the Toraja, bridewealth has also assumed the function of legitimizing children (—); and everywhere the communal right of avail over land is gradually fading. Yet none of this is brought about deliberately, and the people think that they are applying the ancient rules in new situations. As Sumner Maine puts it in his *Village Communities* (4th ed., 1881:110, 116):

> 'These rules ... do not purport to emanate from the personal authority of their author or authors ...; there is always, I am assured, a sort of fiction under which some customs ... are supposed to have existed from all antiquity ... Legislation is the only term properly expressing the invention of customary rules to meet cases which are really new. Yet, if I may trust the statements of several eminent Indian authorities, it is always the fact or the fiction that (the) council (of elders in the village community) merely declares customary law.'

If it withstands the passage of time, ancient adat law can in this way acquire a new *raison d'être,* a new role. For instance, the

assistance rendered by village authorities in individual land transactions — assuming that in former times this was nothing but a manifestation of the village right of avail — may become of practical value for the attestation of legal transactions, and for this reason may outlive [*243*] the right of avail to which it owes its existence.

The lesson for us is that we must not begin by asking whether we approve of a practice. We should start by understanding it. But our administration and courts of law need not be more ancestor-minded than the Indonesians, and they should not feel obliged in every case to uphold ancient adat law at the expense of new. (—) Further, we must be on our guard against logical and rationalistic explanations of adat law — something at which Indonesians, too, become adept after being introduced to education and the passion for dialectic. They run the risk — as we ourselves did with the rise of science in our country — of losing sight of the non-logical and non-rational origin of many things. New adat prescriptions, in the sense of new rules of conduct consciously framed by the people themselves in order to replace old rules which they now wish to abandon, are therefore virtually only conceivable in groups severed from their traditional roots. Christian Indonesians are the clearest example of this.

c) In addition to habituation from childhood and fear of the ancestors, there is a third motive for faithfully observing adat law: self-interest when it is threatened by another's violation of the adat. The obvious course of action is then either to warn the other to respect one's rights, or to resort to self-help. He who finds a stranger working in his field, or sees the preferential rights which he established with visible signs in the forest violated by another, or comes home to find another man talking to his wife (often a serious adat wrong), will chase the offender away if he can, and teach him better in no gentle fashion. (To what extent self-help is still considered lawful, will be discussed below.) But besides this, he calls upon the aid of his guardian ancestors [*244*] by putting protective signs near places which, according to adat, should not be violated (—). Such signs are especially in use to protect a crop in the field, or a patch of virgin forest intended for reclamation, or a selected tree. They may serve to indicate that a field has been distrained by the authorities or other claimant, or in order to prohibit the picking of fruit or the reaping of crops. Examples are the 'banning' sign in Aceh; the *uru, matakao, kanwahit* and other *sasi* signs in the Moluccas; the *sawèn* in Bali and Java; the *haseupan* in West Java; and the *kiàdi* or *kiàlu* in Madagascar.[5] In similar fashion the imputed

mystical power of an official government 'stamp' is believed to lend greater force to adat agreements (Holleman, 1920:400; and in AB XVIII:96), and people feel protected if they have a travel pass bearing the Dutch coat of arms, or a stamped cultivation permit. In such protective signs there is a combination, a joining together, of the ancestral sanction and personal sanction for the maintenance of the adat. This combination is also evident in the cursing formulas (usually heathen, though also Hindu or Moslem) appearing in such written announcements as 'Should a miscreant attempt to disobey my instructions, may lightning strike him, may tigers devour him, may Allah turn his land into a wilderness' (Kern, 1917 (VI):308-16; Schrieke, 1918: 399, 400, 408; 1919:146-7). In a typical variant of the formula, a man vowing to uphold the adat with the help of the gods will put a conditional curse upon himself. Self-cursing was briefly mentioned above (p. 218) in connexion with legal change and the acceptance of new law, but it is mentioned here as a means by which a person disciplines himself to observe adat law or a particular obligation imposed by it. A Moslem Indonesian may employ Moslem vows for [*245*] the same purpose.

d) As the last cause for the voluntary observance of adat we find that the people regularly talk and hear about their adat rules. There may be no official 'law reciters' in the old Scandinavian or old Friesian sense (cf. Deuteronomy 31:9-13; or Ezra's reading aloud of the law), but in many areas adat is a constant subject of conversation in village and home. Adat scales of payment are recalled, adat sayings recited and discussed, adat terms explained, and so on. In Minangkabau, this kind of legal knowledge is said to be highly developed, but throughout Indonesia it is also flavoured with inaccuracy and learned pretence (—). We may compare the effect of such communications in the popular sphere with our own constant recounting of the Mother Goose stories or Grimm's fairy tales, or of regular bible readings, or, among the farming community in Tirol, the habit of spending the winter evenings with reading the Austrian Civil Code (Maine, 1881:55-6). The modern version of this inculcation of adat is its discussion in the Indonesian press, for instance, the *Soara-Batak* (from 1919) and *Oetoesan Melajoe* of Padang — see e.g. AB VI:221-43. (—)

The situation among Chinese and other foreign orientals as regards the observance of their own adat confirms what has been said already. Habitual usage beginning in childhood explains the position of Chinese women in Indonesia, and the persistence of concubinage and marriage

by purchase. Awe of the ancestors, whose 'soul tablets' are still worshipped on the family altar (—), helps to ensure the continuity of the family, while self-protection of interests is manifested, among other things, in the artificial unity of the family estate (—). If we remember that outside the former little merchant (*kongsi*) states of West Borneo there were no Chinese judges to uphold their adat, that the Chinese of [*246*] the Indies are very mixed and without much cohesion, and that the government decrees of 1855 and 1917 and our courts have in many respects failed to support their adat, it becomes strikingly clear how vital the voluntary and good-natured observance of their adat law is for its persistent functioning.

Nevertheless, as regards both Indonesians and foreign orientals it will be obvious that the adat law becomes shaky when one or more of these four sustaining pillars goes missing or begins to crumble. One thinks immediately of those people who, individually or in small numbers, have broken away from their own community, and of the lack of cohesion in the European towns, in contrast to the population of the countryside full of villages, and of indigenous capital towns like Surakarta. In the past, and often even today, Indonesian migrants usually had their own quarters and headmen (the so-called 'nation heads') in Batavia, Macassar and other large towns. This situation probably favoured adat observance by the group concerned, as did residential segregation with foreign orientals.

Christian Indonesians who lose their fear of their ancestors (which is by no means general) and who become less sensitive to the ridicule and disapproval of their fellow villagers, or who form residential communities of fellow adherents, may well lose a powerful motive for observing the ancient adat law, but their observance of their new Christian law is likely to be sustained again by the fear of their friends' ridicule, the fear of God's will, and the regular reminder of His commandments.

2. *Attested Observance of Adat Law; its internally guided development*

Against the voluntary observance of adat law one should not at once pose the opposite: observance compelled by courts of law and the police. Between these extremes there is an intermediate form, of particular importance in Indonesian and Chinese adat law, but easily overlooked by westerners because it is largely or entirely unknown in present-day western law. This is the practice of headmen and others

of giving guidance in the observance of the adat, of taking it under their care and supervision without there being any question as yet of the resolution of disputes or of action to enforce the law.

The most obvious examples are to be found where people live together in easily supervised and sometimes self-contained groups — in families, villages, village federations, clans and tribes. From the outset we should keep in mind that there need be no strict division between administration and justice in adat law, even though Indonesians are familiar with the distinction.

In village organization and village services, in Java and elsewhere, we find a situation in which, besides the first-class core-villagers, secondary residents, and third-class hangers-on, there are also old people, youths, and widowers, some robust, some weak, to whom no mechanical classificatory rules apply. How are they ranked then? In their case the village authority sees to the observance of adat law by consultation, by taking relevant circumstances into account, by reaching some compromise if necessary (Camarecq, 1861:266).

[*248*] In southern Sumatra and elsewhere, succession to titles, title names, and dignities is complicated by the system of alternating between different branches or residential wards of the same family, the *adat bergilir* or *balègar*. The system works only because the joint heads of the *dusun* or village federation keep an eye on things to see that the rules are fairly applied; should the government step in to cut knots instead of patiently unravelling them, the result is likely to be quiet resistance born of a sense of injustice.

If one knows what to look for in the literature, numerous examples can be found of the headman's influence on the conclusion of marriages, among heathens as well as among Hindus, Moslems, and Christians (—). Marriage is nearly always a matter of village interest. Headmen concerned with these matters are not resolving disputes or performing the function of a Dutch civil registrar; they join in the discussions, holding forth on adat law, and seeking a way out whenever its application is uncertain or in jeopardy. It is the kind of intervention which parents in western families permit themselves in their children's affairs. The time and attention which they have to give is reflected in the monetary gifts they receive in matters of marriage, gifts which are often much larger if they concern the more complicated marriages between persons from different villages. The family wedding feast, primarily a propitiation and notification to the ancestors, is likewise an expression of co-operation by the family

authorities, and it provides publicity as well (—). The village headman in Tapanuli, who supervises the exogamy regulations and other adat rules (—), and who 'gives his blessing' to the marriage, is doing fundamentally the same as the village headman or village moslem officiant in Java, who is said merely to provide necessary information and to conduct the parties to the senior officiant (*naib*). Rules like those prescribing that a younger sister should not marry before the elder, or stating that certain marriages are to be preferred, are also subject to the guidance and supervision of these adat heads.

Possibly even more striking is their guidance and assistance in [*249*] cases of the dissolution of marriage, a matter which is not left to the parties concerned and often does not lend itself to a judicial verdict in our sense, but calls instead for calm consideration and a reasonable compromise. In such cases the assistance of village and family heads is indispensable, and in return for it they rightly receive some income. From New Guinea comes the story of a woman who sought to end her marriage by absconding in a boat, but the supervisory family (village) authorities refused to co-operate, and the woman was brought back to her husband, amid screams and cries, to everyone's amusement (Van der Sande, 1907:270).

Despite government justice, which recognizes only judicial divorce, the dissolution of many marriages (and the consequent distribution of goods and children) in the Minahasa outside the larger centres is said to be still arranged under the guidance of the village authorities, and is only afterwards referred to the *landraad* court for confirmation. In Borneo, the Philippines, among the Toraja, in Ternate and on Buru the procedure is the same.[6] On Buru, the head of the tribe finally cleaves a rattan stick held by the two parties; the westerner is inclined to see this as his (judicial or administrative) 'decree of divorce' (—), whereas he had simply acted as an adviser and mediator. That some of this kind of mediation has lingered on even in cases of non-judicial dissolution of Moslem marriages in Java (by *talak, kuluk,* or *rapak*), has already been surmised on page 177; and that the Christian Javanese have wisely not abandoned it is apparent from their adat regulations, which show that the Christian parish authorities very often play the part of the village authorities elsewhere. (—) Fully [*250*] comparable with this mediation by Indonesian headmen is the mediation of Chinese headmen or lineage heads in the conclusion of marriages or their dissolution, though the latter has, again, been mistaken for a judicial process.

Adat rules relating to guardianship and other caretaking of unattached minors are rare and usually poorly developed; it is through the mediation and guidance of the headmen that these legal lacunae are often filled (pp. 164-5).

That the essentially accommodating Indonesian law of succession would not be able to function properly without this kind of authoritative mediation [becomes evident from its application in Java and many other places]. It is precisely because of the lack of unified deceaseds' estates, of fixed inheritance shares, of strict rules regarding the payment of debts by the individual heirs, that such guidance becomes indispensable. If one takes instead the intervention of a Moslem religious judge the result will be something quite different: a decision based on fixed (*kitab*) rules. (—)

In matters of land law this involvement of adat heads often coincides with their exercise of the right of avail of their jural community, and in various cases (including land transactions) it is open to dispute in which capacity they act. But regardless of this question their guidance is evident. The division of family land (i.e. land of a jural community) is not left to those entitled to share in it; the village supervises and takes a hand in the matter. (The role of supervision and mediation, without compulsion or judicial action, which the agrarian regulations of 1915 and 1918 assigned to the civil administration in the West Coast of Sumatra and in Manado, appears to be conceived on adat law principles.) What we call perpetual servitudes can largely be dispensed with, thanks to supervision by these authorities. Even the weighty substance of the adat law relating to water [*251*] is based on a few main rules (—), which nevertheless operate satisfactorily in practice by virtue of the headmen's guidance.

This steady attention by local leaders to the proper observance of adat — whether they are ordinary headmen or special functionaries like the 'custodian of the land' in the east of the archipelago, or village elders in central Java — means that these men are a mental store of information on adat law as it really is. We shall return to this when dealing with the administration of justice.

We should, however, be underrating and misunderstanding the significance of the helpful role of these authorities if we saw it mainly as a means of proving facts in the event of some future dispute. It is the discovery of Holleman (1918) and Logemann (1924) that Indonesian legal commerce knows a form of participation in transactions which can be broadly defined as 'giving warranty' for what is taking

place (*tanggung, tanggel*), the essence being that a person makes it known that he sees no objection in adat law to the transaction concerned, and that he will not contest it at any future date. This form of 'testifying' — something between being a party to a transaction and being a witness to it in our law — can as a matter of course be done by ordinary villagers, by private individuals, but it is especially the participation in legal transactions of adat authorities, of village headmen and the like, which corresponds most faithfully to this definition.

As mentioned earlier, the large amount of work involved by this constant involvement in all manner of transactions in everyday life finds compensation in, and is reflected by, various adat revenues (—). Europeans are readily inclined to frown upon these, as though adat heads ought to live on air and should regard all their work as the natural consequence of an honorary office; or that it is their income that really matters to these leaders, their activities being of [*252*] secondary importance. Presumably this view is not unaffected by the discovery of cases of profiteering (no more absent among Indonesians than among Europeans), but also by the naïve idea that the Indonesian's material needs are so few that he ought to be innocent of all desire to make a profit.

While the above has adequately shown that this attested form of law observance occupies a broad area between voluntary observance on the one hand and compulsion by means of court or police action on the other, it has yet to be spelt out why it is indispensable to adat law. This has to do with the numerous adat precepts which do not constitute commands or prohibitions, but recommendations or expressions of disapproval. Commands or prohibitions can be maintained by a judge's order or by force; the preference for, or disapproval of, certain behaviour on the other hand finds its natural support in the influence exerted by adat leaders, who by their supervision and co-operation help to steer things in the desired direction. Although, in western eyes, such approbation and dissuasion are likely to be looked upon as belonging to the field of morality and ethics, they do form an integral part of adat law; this fact, and the attested observance of adat precepts, are interconnected.

Now, in Indonesia, the mediatory efforts by adat heads — the topic with which we are here concerned — are a hundred times more frequent (and therefore so much more important) than the dispensation of justice in the strict sense of the resolution of disputes by judicial authorities whose word is law. These mediatory activities considerably

reduce the number of lawsuits without infringing the field of formal justice. When a sale of land has been concluded or abandoned with the headmen's assistance; when a marriage has been sealed or prevented under their watchful eyes, or postponed through their action, formal litigation as to the rights or wrongs of the matter always remains possible. Nothing of all this is reflected in our judicial system and the phrasing of our legal regulations (—). Our regulations do not prevent this attested form of law observance, but they have no notion of it and do nothing to draw the attention of the courts to it.

[253] The mediatory function of the headmen, which westerners like to describe as 'patriarchal' (—), is repeatedly, indeed usually, exercised in consultation with and in the presence of their subordinates: so with the Acehnese village authority, the Minangkabau village and family authority, the Minahasa family council. Participation by subordinate folk lends a strongly democratic character to this type of adat observance — democratic, that is, in the oriental sense (Haga, 1924:27-35). If instead the district officer is called in — a not infrequent occurrence and a tribute to the confidence he has succeeded in inspiring — there is nevertheless a serious risk, not only that the maintenance of the adat will become more a matter of passing judgments and deciding issues than of the traditional way of discussing and straightening things out, but also, and more particularly, that this homely consultation with fellow members of the community will fall into disuse.

The attested observance of adat law springs from motives not unlike those behind its voluntary observance: preference for and compliance with what one is accustomed to; awe of the ancestors (everywhere in the archipelago the primary task of the adat heads is to see that the wishes of the ancestors are observed and to act as their earthly representatives); self-interest in the undisturbed current of affairs; and belief in what has been inculcated from infancy. Accordingly, the factors which may, in the case of voluntary observance, result in modifications of the law, make themselves felt here as well. Adat leaders cannot close their eyes to changes that have come about imperceptibly; and the very nature of their mediatory role offers them an excellent opportunity gradually to accommodate new needs and desires. Thus they allow the adat of the forefathers to undergo constant change, sometimes even without being conscious of doing so, though on Bali the awareness of change is now and then evidenced by the fear which people have of opening and consulting the text of an ancient

village regulation (Liefrinck, 1980:338). The danger lies particularly there where it is in the interest of the adat heads to advocate conservation, while the interests of the people instead demand change; consultation with subordinates must then provide the solution. [*254*] Especially in such matters as the fictitious interpretations of adat rules and of kinship relations (above, p. 218-20) the adat heads can do much by lending or withholding their co-operation. But the assistance they render can never, except in abnormal, temporary circumstances, acquire the form of an adat prescribed by themselves. Adat settlements arrived at by missionaries or government officials in consultation with 'the chief', but not truly accepted by the people, deserve neither the support of the courts (being no more living adat law than they are binding statute law) nor the support of the adat leaders. Fortunately, this is often recognized in respect of adat regulations made by and for Christian Indonesians and in government consultations on adat reform (—).

Whether the intervention by headmen sketched above will result in a veto or be confined to advice and information, depends mainly on the respect they command either generally because of their office or on account of their personal qualities. It is the same as with us in Holland regarding the influence a father has on his adult income-earning son, or a burgomaster on his municipal council, or a minister on parliament: it varies with situation, time, and person. At one time the princely government of Ternate tainted the headmen's authority on Ambon, causing it to be coercive and tyrannical (Holleman, 1923:56); and also the Dutch administration can mar it by insisting constantly and in every field of activity that the only essential virtues are authority, coercion and efficiency.

The mediatory role of adat headmen is of great significance also because Indonesian justice functions in exactly the same way. It, too, weighs one interest against the other, and allows the weightiest to prevail; it, too, seeks to draw from broadly formulated guidelines the most appropriate solutions; it, too, takes preferred and disapproved ways of conduct into account. The distinction between attested law observance and its maintenance by judicial action is that the second involves a dispute which the court settles by making an enforceable judgment without direct consultation with the community concerned. But this is much less than the difference between the free system of [*255*] justice through mediation in the Indonesian sense, and a more mechanical system in the western sense.

Since influential groups of foreigners from east and west came to Indonesia, historical developments have sometimes caused the legal guidance discussed above to pass to others than adat leaders: to Indonesian and European civil servants, missionaries, Indonesian clergy, or even to Europeans who have won the people's confidence and acquired a say in their affairs by virtue of personal qualities or prolonged contact with them.

[Some] agrarian regulations have provided the example of government officers being charged with giving this kind of guidance; sometimes even responsibilities under the right of avail over land have passed willy-nilly into the hands of these officers.

(— —)

Everything said so far about the guided observance of the autochthonous components of adat law with the support of adat heads applies likewise to the field of religious law. Those responsible for the maintenance of Hindu law, Moslem law, Christian law (—) act only to a very small degree in a judicial capacity. Their influence is exerted mainly by means of supervision, exhortation, guidance, consultation, but as regards certain parts of the religious law it is nonetheless most effective.

It need hardly be said that this non-mechanical way of maintaining adat law is also reflected in the fact that it does not prevent the occurrence of some anomalies; or in other words, its maintenance depends on the reasonableness of its application. Anomalies may be due to unforeseen circumstances, but in most cases they result from cunning attempts to use, or abuse, the law. When a person abuses [256] his right to collect forest produce within his village domain by gathering excessive amounts for the benefit of Chinese or European entrepreneurs, when someone makes use of his preferential right to land in order to keep others out while failing to cultivate the land himself, or when a Minahasan family abuses its *apar* right to land in the same way, the adat heads could put a stop to this.[7] It was their mediatory leadership which prevented the village right of avail being a constant headache to the princes on Bali, just as it is also responsible for the fact that the same right of the village, clan, or autonomous chiefdom never appears to obstruct the government in its plans. It is especially here that the value lies of regulations prescribing that these heads must be given 'prior notice' of certain legal transactions, for even though their approval may not then be required, they are given an opportunity to guard against conflicting or unreasonable applications of adat precepts.

If the matter discussed in this section is looked at from the viewpoint of the adat heads their function appears to be threefold: first, help with the proper observance of the adat (usually as the representatives of the forefathers); secondly, to be living adat repositories by virtue of what they witness, experience, and hand down to their sons (—); and finally, to dispense justice on the basis of adat law. The most important of these, though, is the first, and not the judicial function which is to be discussed next.

3. *The Role of the Courts* *

a) *The scope of the judicial function*

[257] Although there may well be a few communities and situations in Indonesia where adat government and adat justice are still indivisibly merged, almost everywhere the administration of justice is a separate function with a distinctive name. The Indonesian judicial process is, then, the binding determination or 'resolution' of a dispute (including a criminal offence). One must guard right from the outset against imputing the existence of all the elements of modern western judicature into this Indonesian system.

What is the scope of this manner of dispute resolution? It can include any matter resulting from disputes in which right and wrong are involved. Its province is therefore not only questions of mine and thine, descent and marriage, legal capacity, inheritance, and impermissible conduct (both torts and punishable offences); but also questions of rank and hereditary title (*galar*), the right to wear a particular costume, the boundaries of a Dayak tribal area, the omission of a compulsory contribution to a feast, failure to render due assistance, disregard of adat precepts, or the ritual cleansing of persons made

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* [This section comprises an editorial selection from the long chapter 'The Maintenance and Development of Adat Law by the Courts' (pp. 257-402, Vol. II of *Het Adatrecht*). In the present edition, sub-sections *a, c* and *g* contain the bulk of the original parts 1-3 and 12; sub-sections *d-f* are no more than a 'mosaic' of passages culled from parts 4, 5 and 9 of the original. In this chapter, written at a crucial time (1926) in the political battle for the recognition of adat law, Van Vollenhoven addressed himself perhaps more directly and exhaustively than in most other parts of his *Adatrecht* to the (colonial) judicial and legislative authorities to whom the preservation and development of adat law would be mainly entrusted. Much of his vast and critical survey of current practices, views and statutory provisions, however necessary and useful at that time, has since lost its relevance, and therefore has been omitted here. - *Ed.*]

impure by crime. A judge installed by our government, who would consider such matters to be 'not judicable' because they fall outside the field of civil or criminal law, would not be understood. In the [258] Lampung area, the adat judges (*penyimbang*), though deposed by us, to this day continue to deal with such legal disputes, because our government judges — as was believed — are not (permitted to be) interested in these matters, or refuse to recognize them as legal disputes. On the other hand, even the Indonesian judge will have to turn away claimants if they merely complain about legally non-consequential acts: a betrothal or promise not made binding in law, or any other issue not concerning questions of right or wrong.

What has been said does not imply that every Indonesian judge must be considered competent to hear every legal issue. But we may take it that the grounds on which responsibilities were divided between various judicial forums differed from those on which full jurisdiction has been allotted to courts in the system we introduced. How old the indigenous institution is of special judges for agrarian disputes (above, p. 160) cannot yet be ascertained.

Two foreign importations must have been of some consequence for the scope of indigenous village justice: the distinct jurisdictions of foreign rulers and of Moslem religious judges. But they were of little importance, and the old indigenous system continued to function besides and sometimes parallel with them. Both importations certainly contributed to a clearer distinction in the popular mind between justice and administration, and to introducing or promoting the idea of judges having competence not in all cases but in special categories only. The princely administration of justice in Java moved in this direction, having, for example, appropriated to itself all disputes involving its functionaries or serious offences, and leaving the rest to lower state officials, or to village justice (—).

It is, however, not enough to have judges; it is above all necessary that those seeking justice actually go to them. One significant fact concerning the judicial enforcement of adat law should therefore be noted straight away: in almost all parts of Indonesia the people are reputed to be addicted to litigation. This phenomenon is singularly lacking in present-day Java, and therefore it was rather late before it [259] was generally recognized. But from the territories outside Java, and from the Philippines and Madagascar, the addiction was confirmed over and over again. In Palembang people would crawl under the floor of the raised *rapat* chamber [courtroom] and take part in

the proceedings by shouting up through the floor; in some Batak regions an excitable audience would throng around judicial activities; on Ambon and in numerous other regions law suits occupy the centre of public attention (Haga, 1924:35-6). This fondness for litigation (*perkara*-love), the involvement in which is regarded not as a worry and affliction, but the absence of which rather as a sad deprivation, has not yet been ethnologically or psychologically analyzed. Probably the monotony of traditional life, stimulated only by the excitement of war, litigation and games, contributes to it, and among various population groups law-suits fulfil a function similar to that of parliamentary or church politics, or evoke the emotions aroused by trade union activities, concerts, theatres, cinemas or travel in our society. What we know of mediaeval western Europe makes this supposition likely; though it remains a mystery why Java should be an exception.

For the judicial maintenance of adat law, however, it is not sufficient to know that there are courts charged with maintaining the substantive adat law, and that the people go to them. It is also necessary to know that such courts are permitted to apply adat law in full, and in a manner consonant with adat judicial practice. This often still happens in truly Indonesian courts (i.e. before truly indigenous judges, and besides these, in the district and regency courts of Java and Madura); but it is seldom the case with the government, district and regency courts outside Java and Madura, or with the higher Indonesian tribunals.

With an application of adat law 'in full' we have particularly in mind the conclusive treatment of actionable wrongs. The task of an Indonesian judge is to put an end to a dispute, to settle it, to make it a thing of the past, to restore 'coolness'. If our regulations force a court to deal with actionable wrongs only in part, and to refer the rest to either a criminal or a civil session (e.g. because we are not yet familiar with the practice of allowing a civil claim in a criminal action), or if they do not provide for ritually cleansing sacrifices, then [*260*] the matter is not 'finished'. Still less is it 'finished' if the judge, acting in terms of our judicial regulations, resolves an issue between plaintiff and defendant, but not between others involved in it: for instance, a third party who sold something to which he had no right, or who should be compensated, and so on. [On the other hand], adat law is not averse to summary processes which actually settle issues, but our judicial rules often prescribe that witnesses and other people

involved must nevertheless first be properly summoned to court (see Ter Haar; 1919:48ff, 1921:158ff).

(— —)

b) Bringing a law suit

[*261*] The survey of Indonesian adat law in the earlier part of this book repeatedly illustrated how judicial processes — civil as well as criminal according to our classification — are started by the litigants binding themselves to a judge and the judge to them. The traditional model of a trial sketched for us before or around 1860 by a Minangkabau author dramatizes this procedure and underlines its significance. In the opening scene of this play, which takes place in Minangkabau before the officiating 'speakers' or intermediaries (*manti*), the first question they put to the litigants is: 'Will ye put your case in the hands of the judge, whether ye shall be discharged or be burdened with this claim (*adakah engkau suka memulangkan kepada hakim, baik kehilang atau ketimbul piutang engkau itu*)?' This is followed [*262*] by: 'If yea, then ye must render a *tando suko'* (in this play, the dagger of each contestant; in practice often some other object which they would also find it difficult to do without, such as their tobacco box). In the second scene, performed before the court itself (i.e. the joint *panghulu andiko* to whom the 'speakers' have handed over both the contesting parties and their tokens), the parties are enjoined to hand over *taïë amèh* or *tahil emas* to the judges, which secures the return of their *tando suko.* This they do, and the judges reciprocate with a counter-gift, the 'returning gold' (*amèh suruik*), which is given to the 'speakers', and from them a portion to the parties. The court explains to each: 'As thou receivest this returning gold from the hands of the speakers, so receive [thereby] from our hands the acceptance (*ijab*) of thine offer, known as "the horse's head turned", the consequences of which are: "spiked in the ground, notched in the wood, no wavering, no going back, no leaping up nor rolling down".' The parties accept, each taking his share of the reciprocal gift from the hands of the intermediaries. All involved in the process are now bound to one another by earnest tokens — parties and intermediaries to submit to the court's authority, judges to adjudicate fairly — and the business of the court begins.[8]

Outside Minangkabau one finds similar material 'binders' at the start of a trial, with all sorts of local variations. In Aceh, an action for debt started with the offer of processual pledges *(hak gancèng* or

'knotting' money, a sum equivalent to the amount in dispute, or objects to that value) by both parties, and their acceptance by the judge. This signifies 'that the suitor hands himself as a dead body into the hands of the judge' (Snouck Hurgronje, 1906, I:116). Among the Gayo, *sipöt* or *sipöt yakin* was a 'token or guarantee . . . that both parties would accept the court's decision (Snouck Hurgronje, 1903: 115f.). In South Sumatra the processual pledge was found particularly in land disputes, and was called *tanda serah* or *mas angus* (the *ulasan* or *uang walesan* in cases of debt was a percentage of the amount in dispute); in the Lampung area it seems to be called *wang penyingsingan.* In cases of debt, people in the Malay area spoke of *uang méja* [*263*] or 'table money'; in South Borneo, *danda alih* is known (surely not only in actionable wrongs?); in the Minahasa region, *pengasil* or *alas kadéra*; in the Balinese princely courts there was the *toh,* though in village courts the processual pledge did not — or does no longer — exist. Finally, in Java, there was *pakenceng* ('tie-up' money), besides *gantungan* ('floating' money), which seems to correspond with *walesan* in other places and with *gugatan* in the village courts in Cirebon. All this was so much part of indigenous custom that it penetrated even the religious courts of Indonesia: the priestly courts on Bali recognized a 'binder' unknown in Hindu law; and in the Islamic courts in Java 'table money' was customary although Moslem law forbade it.[9]

However widespread and entrenched the feature itself may be, its explanation is beset with snags and pitfalls. Europeans are inclined to explain the material binder given by the disputants either as a guarantee that the court's decision will be adhered to or as a deposit 'pour assurer le paiement des frais de justice' (Tarde, 1912:34). The former is in that case a *cautio iudicatum solvi* (not to be confused with the subsequently misnamed deposit for the trial costs), and hence would be refunded once the judgment had been fulfilled. This accords with what is reported, for example, for Aceh and Gayoland, where the object or money is given back (redeemed) when the judgment has been obeyed — which is the reason why we must call it a processual pledge, not a processual gift. However, three considerations militate against generalizing this explanation and accepting it as the crux of the matter. First, virtually nowhere is there any mention of judges being involved in the execution of their judgments. Though in practice a judgment is often complied with at the end of the trial [*264*] while the court is still sitting, the task of the adat judges

appears to be complete as soon as judgment is pronounced. A prior deposit as security for an execution which is not the concern of the court, does not fit in with this. Moreover, it is nowhere said that defiance of a judgment results in forfeiture of the processual pledge. In the second place, it is not clear why the *cautio* should have to come, as it does, from both parties and not, as with the Romans, from the defendant. In the third place, this conception does not explain why the deposit sometimes varies according as to whether the case is about land, family matters, or debt; why it must so often be redeemed by an actual payment; and why such payment must also be made by the successful litigant.

The difficulties might disappear if one assumed that the processual pledge contains not only the promise to obey the judge, but also to remunerate him for his trouble. That is to say, whenever the amount in dispute and the adat scale of charges are known beforehand, the material binder would from the outset operate as payment of the judges, or as a processual *gift* to meet the trial costs (as it probably is with the *ulasan* in Jambi); but if the judge's remuneration cannot be known in advance the only way would be to give a processual *pledge,* to be exchanged in due course for the actual amount due. A difficulty, however, arises even here, because the information available, although largely compatible with this interpretation, nonetheless deviates erratically from it in some respects. For example, processual pledges appear sometimes to be limited to one kind of action, sometimes to another. What is certain, however, is that giving material binders at the beginning of a court process was both widespread and truly Indonesian, and that it certainly cannot be explained — an all too easy western rationalization — as a product of judicial greed or as an attempt at bribery,[10] even though there are areas and instances where, so it would appear, the judge's ears or mouth must be 'opened' with money (Mallinckrodt, 1925:293). Nor can it be interpreted as [265] nothing but a security to comply with the judgment. Willinck (1909:864, 866) calls the payment and acceptance of processual dues a contract, which may not be the most fortunate name for it but accurately reflects the aspect of reciprocal obligation.

Further serious complications are that there are sometimes two processual payments (i.e. a litigation pledge and a security for court fees) and sometimes three (i.e. a litigation pledge, a deposit on the disputed claim, and a security for court fees); that the three payments are often tied up together; and that their names sometimes add to

the confusion (see Mallinckrodt, 1925:293, 298, 301, on the payment of *gadai* in South Borneo).

What has remained of these processual pledges in present-day Indonesia? Here we must distinguish between the indigenous and the government administration of justice.*

In the indigenous system — despite the considerable changes in it by our administration — processual pledges are still regularly used, and even mentioned in some of our judicial regulations. (—) Of not all of them is their legal function clear, but many of them must be something different from a pre-paid judge's remuneration. As regards the indigenous administration of justice our government therefore seems to have been of the opinion that, since litigation payments are Indonesian and do not obstruct the course of justice, they deserve to be preserved.

There has been a quite different approach in the government administration of justice: the institution was first mutilated, then wiped out because of its deformity. The process began with Raffles [in Java], and was completed by Der Kinderen [in Sumatra].

**[Raffles decreed in 1814, that in civil cases, including appeals, a 'fee' which went to the court officials was to be paid before the hearing; in addition, such 'being the custom of the country', the loser was to be levied ten per cent of the judgment award. The term 'fee' obscured the indigenous conception of a litigation pledge, but the ten per cent levy was more contentious. In 1819, the Dutch Commissioners-General abolished the levy, but kept the old litigation pledge in the form Raffles had given it (with the payment for appeals becoming a 'fine'). Then, in 1825, the levy was reinstituted as a 'general and percentage tax . . . to defray the costs of civil proceedings', only to be scrapped again in Java in 1870; the litigation fines were abolished in 1848.

The reorganization of the judiciary in Sumatra leaves a 'much more painful impression of ignorance and premature action' (II:267). In the preparatory work of the 1860s for Sumatra's West Coast — then partly Batak, partly Minangkabau territory — there is no mention of Batak processual payments; the initial *tando suko* pledges of the Minangkabau seem to be unknown; and the subsequent *taïë amèh* deposits (above) are 'bribery and extortion'. The government saw no

* [For the distinction between the two systems see Introduction, p. LXIIff.]
** [The following bracketed section is an editorial summary of Vol. II, pp. 266-9.]

objection to introducing the 1825 Javanese percentage tax into Sumatra, but preferred the monies to be paid first into general revenue instead of straight into the judges' pockets. The judicial regulations (1874) designed by Der Kinderen, Government Commissioner for Legal Affairs, abolished not only *taïë amèh* but all other adat processual dues as 'incompatible with a proper administration of justice', the headmen being granted instead a 'fair compensation for their loss' out of the new litigation tax. But the reorganization of the judiciary meant that the compensation benefited the members of the newly created *landraad* and *rapat* courts rather than those who would have been entitled to the traditional dues. Another problem with the litigation tax, which was due before the hearing, is that it was not refunded if the parties, by settling amicably, relieved the court from having to decide their case. In short, these litigation payments, though supposed to take the place of traditional adat dues, did so in a manner 'undreamed of in adat law' (II:268).

The 1874 Sumatra regulations were withdrawn in 1914, when members of the *landraad* and *rapat* courts were awarded attendance fees.]

What has been said refers only to the bringing of an action before a court. Before things went so far people would often resort to self-help against an opponent or his kindred, in an attempt to persuade him to reflect, or even to admit his liability (—).

c) Conciliatory nature of the judicial process

[*270*] The adjudication of a dispute can be considered successful only when the judgment is in harmony both with the wishes of those seeking justice and the court's opinion on their conduct. No litigant can always have his way — to expect that would be madness — but he must feel that the case has been properly disposed of and that that is also the opinion of those around him.

It is significant that the Indonesian judicial process operates on the same principle that underlies the attested form of law observance with the assistance of the adat heads, which was discussed in the previous section. They spring from the same source; they differ not in method, but in the way they are started and concluded. The Indonesian feels at home in both, and for the same reasons, for the adat law courts, too, when faced with uncertainties of fact or law, know how to settle, reconcile, accommodate, give and take; they, too, do not proceed mechanically, but weigh up one interest against

another. A modern western judiciary — at least on the European continent and in matters of private and criminal law — works with defined rules of evidence, and for the ascertainment of the law operates with written codes, commentaries and judicial interpretations. It must, therefore, turn down an insufficiently supported claim or insufficiently proven indictment. The adat judge, too, if facts and law are certain, will consider it his duty to apply the law strictly (—), but where such certainty is lacking he will resolve the conflict of interests by a compromise. In a western process, the burden of proof falls almost entirely upon the plaintiff or complainant; the traditional Indonesian process seeks to divide this burden between the parties as a means of partly satisfying both. What is characteristic about all this is, first, that the objective law itself deliberately leaves many points open for the court to mediate; secondly, that sometimes the court is allowed and even expected to mediate, even when there is no uncertainty about facts or law. The following sections will have to make clear that, in spite of this, adat justice is no more arbitrary, or casual, or playing *le bon juge,* than the justice of an international court of arbitration, an international claims commission, or the International Court of Justice at the Hague.

(1) How does an indigenous court deal with uncertainties of fact? Among both oriental and western peoples, and in criminal as well as civil cases, questions of fact predominate. It has been estimated that in civil cases between Europeans eighty per cent of the issues are questions of fact. A revision or improvement of the substantive law can of course not change this; what can do so is the creation of formal requirements and facilities for recording facts, for example, [272] notarial deeds, population registers, and so on.

When a Javanese legal record mentions the 'transfer' (*ngedol*) of a property, but leaves uncertain what form of *ngedol* is meant, the Indonesian judge obviously must first try to ascertain the most likely interpretation from the evidence of the parties, witnesses and prevailing circumstances (cf. AB IV:607-9); if that fails he will have to find a decision which both parties regard as reasonable. In Bengkulu, when a betrothal contract has been broken and it cannot be established who is at fault, the judgment may be that the bridegroom does not forfeit his betrothal gift (*antaran*) and that the bride must pay back only its actual value instead of the customary double amount (see AB VI:414). In Central Java, if a dispute arises between the owner of a field and the tenant holding it in return for a loan, or over

whether a residential plot has been sold or let, and the facts are uncertain, it may happen either that the existing situation is continued upon the payment of a few guilders by the defendant, or that the original situation is restored upon the plaintiff's payment of a few extra guilders (AB XII:39-40). These are some examples of the kind of judicial mediation which Hartzfeld (1915:48) regarded as 'the very essence of nature and reality' — a point of view hotly debated by the Dutch Society of Jurists in 1916, but found to be gaining ground by the editors of the *Rechtsgeleerd Magazijn* (35, 1916:620). Of course, not every mediatory judgment in case of uncertainty of facts deserves praise; but at least the court cannot be said to have evaded the problem by dismissing the claim as not proven. (—)

(2) How does an indigenous court deal with uncertainties of law? [*273*] In Madura, a village functionary gave up his field for a year to another person, but his dismissed predecessor, pretending that the *sawah* was still *his* field, handed it over to a fourth party. When the court recognized the first two to be in the right, did the fourth person have no right whatever to the crop cultivated by him in the meantime? Adat law leaves the question open, having no specific rule about crops grown in good faith; but the judge satisfied the second and fourth parties by assigning to each one-half of the harvest (AB VIII: 271-2). In Bondowoso, a wet rice field fell dry after a few years, and an enterprising Madurese put it back in order and cultivated it. Only when the crop stood ripening in the field, did the owner come forward to claim his right. As adat law leaves the question of the right to such a crop open, having no special rules about produce grown, or claims delayed, in bad faith, the court apportioned half the harvest to each party (*idem*). Similarly, countless complications with share-cropping are deliberately left open in adat law so that the court may settle each case on its merits. It is the same with complications concerning family property in polygamous marriages (—); or with the question of whether accretions by siltage to residential plots fall under the adat-ownership of individual holders or under the village right of avail; or with the crop rights of the lessee of an official field if during the lease the field is transferred to a new office-holder (AB XIX:260-1; XIV:79).

The characteristic feature of these solutions is not only that the judges, because adat law remains 'silent' on such points, are expected to resort to compromise, instead of supplementing the objective law, [*274*] or of importing foreign rules as the old section 75(6) of the

1854 *Regeringsreglement* suggested. This kind of judicial action is both legitimate and obvious, because adat law constantly assumes that courts will find their way in such uncertainties. The most significant thing is that adat law, as a rule restricting itself to main principles, does not regard conciliation as a last resort, but expects it to be a more satisfactory way of resolving disputes than the mechanical application of detailed prescriptions which, though designed for certain cases, would not work in others. And the result? Whereas examples of mediatory judgments impelled by legal uncertainty in Dutch law or European law in the Indies can be recalled only with difficulty (Hartzfeld, 1915:20), in adat law, because of the very nature of it, such judgments are numerous. In the choice between certainty and flexibility adat law has always convincingly opted for the latter. The position is similar to that of the problems of the international law of contract, which half a century ago people thought could and should be solved by the acceptance of some more or less refined statutory rules: it is now recognized that they can be overcome only by regulating that which can be foreseen, and entrusting the rest to the judges. In a similar manner adat law frequently leaves to the court's discretion such matters as the dissolution of marriage by mutual consent, applications of the right of first option, irrigation rights, and obligations comparable to our servitudes, thus making it possible that, within the framework of recognized principles, the law will be 'found' in each concrete case: that is, justice in 'adat style' (Hekmeijer, 1909:1312).

(3) The most significant of all, however, is the third situation in [*275*] which adat courts mediate — and are expected to do so — even when both facts and law are perfectly clear: when a decision according to the letter of the law would be illogical, or out of keeping with the popular sense of justice. This practice seems most unwestern. Meijers (1916:2) defined a mediatory judgment as one which permits compromise only 'on grounds of doubt regarding the facts of the case or the law to be applied' (*Themis*, 1916:2), but Hartzfeld failed in his attempts (1915:16f., 19, 27, 31) to find western examples of this. Yet this is fully in accord with the attested observance of adat law discussed before, and with the constitution of that law itself.

One night in Bengkulu a complex of shops was burned down; as the culprit could not be found, the local *marga* community had to make good the damage (AB V:124-5). In the same area, some boots were stolen from a traveller; the guilty party could not be traced,

and the *marga* was held liable. In Palembang, a European's horse was stolen, and the *marga* held liable for similar reasons; but although the value of the beast was firmly established, the court reduced the claim to the amount which in former times represented the adat rate in the case of manslaughter. Without this correction the judgment would have been considered both unreasonable and objectionable (cf. AB V:253, for the Jambi area).

In Jambi, a family comprising two branches had long ago surrendered part of its land in return for a loan of money. Later, the first branch redeemed the land at its own expense, because the second branch refused to join in. When the first branch proceeded to plant rice on this land the second branch, still having a right in it, made trouble, and several people were killed or wounded. The matter was taken to the local *rapat* court. Facts and law were clear: according to adat law, the land should have been redeemed by the owner, the family as a whole. Nevertheless, it never entered the judges' heads to declare the redemption illegal, and to leave it at that. They made [276] the second branch pay half the redemption sum to the first, and divided the land itself between the two (AB V:304-5).

A Minahasan family, likewise comprising two branches, had become the adat-owner of two plots of *sawah* land by inheritance. The first branch moved away, whereupon the second branch (actually some individual members of it) sold both pieces of land. Branch one, returning twenty years later and finding the pieces sold, turned to the judicial authority at the time, the district administration. The facts were clear, the alienation was obviously illegal. The court had the power to redress the illegality in whatever way it deemed best, provided the aggrieved family (as a whole, as a legal personality) was duly compensated. The court, however, found a mediatory solution, in which the plots were presumed to have been separately apportioned at the time of inheritance; the alienated first parcel was construed as having been the property of branch two, which allowed the sale of it to stand; the alienated second plot was taken to be the property of branch one, and its sale was therefore voided (the buyer to be compensated by the illicit sellers?). For this judgment of 1882, see AB III:148, 151. (—)

[277] These examples have a wider significance than might at first be thought. When the facts and the objective law are certain, one might think that only in pathological cases would courts resort to conciliation, mediation, flexibility. But the adat rules themselves rather

suggest the possibility of judicial mediation whenever necessary for the ultimate aim of adat justice: peace. The Minahasan adoption contract subsumes the right to inherit, and is permissible even if the adopter has children of his own. But if the latter feel seriously injured, and can satisfy the court, it can withhold judicial recognition of the lawfully arranged adoption in order to keep the peace and to 'cool down' the situation (cf. Carpentier Alting, 1902, I:190). Here the similarity between attested law observance and the judicial maintenance of law is particularly clear, in that although specific rules relating to abusive, unreasonable or absurd applications of the law may be lacking, it is a natural part of a judge's task to prevent such practices.

(—)

Continental European jurists would of course have no objection to this kind of intervention by the court, provided it is explicitly authorized by statute law; but adat law implicitly assumes such freedom to be part of its constitution. A whole range of provisions of which the legal consequences are spelt out in Justinian's and the Napoleonic codes, for instance, acting in good or bad faith, being *in mora* or not, acquiring rights by prescription or succeeding under general title, can be done [*278*] without in adat law because its judges are assumed to know what is right in concrete cases. A similar contrast could be drawn between the French criminal law immediately after the Revolution, which sought to turn judges into mechanical 'mouthpieces of the law' in order to prevent arbitrariness, and the Netherlands Indies Criminal Code of 1915, which, within defined limits, allows public prosecutor and court to handle matters according to their discretion.

The consequences flowing from the adat conception of a judge's task are important. A demonstration of these consequences should prove the validity of our general contention. To avoid misunderstanding, we must first reiterate that Indonesian adat judges will in hundreds of cases apply the law strictly and without thinking of mediation, once the facts are proved. To ascribe a conciliatory nature to their jurisdiction is no more than to say that, if the facts or the law, or both, give cause for it they are free to apportion fault — or merit — between the parties; not that they invariably, or usually, do so.

The first consequence is then that, in a frame of justice permitting courts to mediate, there is no room for legal actions with strictly defined objectives. What the court is asked to give — what in attested

law observance people expect from adat heads; or, elsewhere, what they hope for when appealing to a legislative body — is a legal remedy according to the wisdom of the authority appealed to: *kula nyuwun pengadilan; kula neda pirukun; minta adil* (—). The plaintiff will, it is true, frequently state that his claim concerns a particular field, or beast, or sum of money, but this does not have the Roman law meaning of 'this and none other'. For the court can always, in the case of an illegal sale, either declare the sale void, or allow it to stand while finding redress by some other means; or it may give preference to sale over lease in one conflict situation, but lease over sale in another (—).

[*279*] Furthermore, there is in this legal framework no room for a formal joinder of issue (*litis contestatio*); such a conception is no more to be found in Indonesian languages than it is in Dutch. A *litis contestatio,* which fixes the terms of a claim when it is submitted to the court, appears to exist in Indonesia only in some Hindu courts at Badung on Bali, where, once the claim has been heard by the 'stone image' (*watu tumpeng* — actually an impartial observer of the court sessions), it can no longer be changed (Korn, 1924:221). Likewise, there can be no room here for objections to additional or revised claims. (— —)

Finally, settlement and arbitration are more akin to this kind of judicial process than they are to the usual western-style administration of justice. If the aim of the Indonesian process is not so much to unravel a juridical tangle, but rather to achieve peace ('coolness') between the contesting parties, then it is wise that [some statutory provisions] emphasize the court's duty to seek a settlement whenever possible. Often, however, this can only be achieved at an advanced [*280*] stage of the process, and it certainly does not absolve the court from its duty thoroughly to examine points of dispute against their juridical background. In the practice of *landraad* courts it seems that, if a settlement is reached during the hearing, the preceding part of the record is simply deleted; in practice, therefore, settlements are permitted 'at any stage'.

A settlement is a mediated solution to which both parties are ready to subscribe, and which merely needs to be confirmed by the court; a conciliatory judgment becomes necessary if the parties are not prepared to settle and a judgment exclusively in favour of one of them seems inappropriate. (—) Moreover in a judicial system pursuing these ends, the dividing line between formal adjudication and village

justice is not a sharp one, and mediation by adat heads and adjudication being conceptually related, there is hardly any reason to sustain the contrast between the judge who wields the iron rod of the law and the arbiter who decides as a good man in fairness.

At no point, however, does the traditional exercise of justice reveal the conciliatory, homely character of judicial intervention — and the need for this — more clearly than where it concerns what in Central Java is called '*rukun*' [the spirit of give and take] between contracting parties. The relation between *rukun* practice and the administration of justice probably provides a fitting end to our argument.

It was Holleman in particular (1918:433-9; 1923:159, etc.) who drew attention to *rukun* in Java and Ambon. It amounts to this, that an Indonesian, when making a contract, avoids exhaustive and inflexible terms; and that even as regards binding conditions he is prepared to be tolerant, for instance by allowing deferment of payment. He makes no exorbitant demands on the other, does not unduly press him; he will be no Shylock. Even litigants will where possible try to [*281*] part as friends — quite unlike the norms in Ihering's *Kampf ums Recht.* An Indonesian contract, says Holleman, is more of a rough draft of the parties' intentions than an agreement covering all eventualities. The Javanese who contracts in any other way would resemble a Chinese, Arab or European, and be regarded as what we call a usurer or profiteer. Naturally, the *rukun* spirit is stronger between fellow-villagers, or between compatriots in a narrow sense, than between Indonesians who regard each other as strangers.

The question here is not whether this characteristic give-and-take should be applauded from a commercial and economic point of view; it is what kind of judicial system corresponds with the *rukun* spirit, and into what kind of justice would *rukun* fit. The answer is beyond doubt. A judge who is not allowed to conciliate, or who looks upon mediation as a rarity, would despair at such contracts (which are ninety-nine out of a hundred); but one who recognizes the freedom to mediate as an outstanding feature of adat law, would feel quite at home with them.

All that has been said applies to Indonesian judicial practice in the traditional style; it in no way refers to Moslem courts, which apply the strictly defined rules of Islamic law (—). Yet even among religious judges, the Indonesian spirit would sometimes appear to prevail over Islamic doctrine; at least there are reports of decisions

by a *kali* at Macassar in 1849, which are of a distinctly conciliatory, non-Moslem character (—). Nothing seems to be known about mediatory justice among the Chinese in Borneo. When a government court must apply western law to Indonesians — e.g. the 1861 Marriage Regulations for Christian Indonesians in the Moluccas — the question does not arise; but if the judge has to apply Indonesian private adat [*282*] law, his efforts can be effective only if he mediates whenever adat law implies or requires it. None of the existing statutory provisions seems to be against it, but it would be a step in the right direction if the legislature were to give the courts a clear sign of approval. 'The atmosphere natural to custom', it was said at a conference at Simla in 1915, 'is the atmosphere of the tribal court . . . ; when we remove custom into the atmosphere of the regular courts we incur responsibility for seeing that it does not suffer from the change of air'. (—)

In recent years the western judiciary — in fact, a senior government court at the capital Batavia — had to clarify its position on this point in connexion with urban land leases (AB XIX:452-5; cf. ITR 1916: 118-27, 1918:58-64, 1923:291-302). First, could a person who had rented another's land in order to live there in a dwelling of his own construction, demand that the court disallow the termination of the lease by the landowner on the grounds of the tenant's irreproachable conduct and because there was no need to end the lease (—)? Second, if the termination nonetheless went through, should not the landowner by way of consolation compensate the tenant for the costs of moving house? The expert consulted by the court and, with him, the court itself, accepted that this form of *rukun* was indeed customary between contracting parties, but that it formed no part of 'the law', and hence could not be recorded in a legal judgment.

But if our analysis is right, the conciliatory nature of a court's intervention in adat cases means that it can give this form of satisfaction lawfully, and is expected to do so as often as it finds good [*283*] reasons for doing so.

Mediation, settlement, departure from the objective law, salving injured feelings — do such things (it might be asked) require a professional legal training? The answer is twofold: first, adat law does not presume its judges to be formally trained men; and secondly, the understanding of Indonesian legal relationships, of their results and remedies is in no way less demanding than the art of healing, the skill of government, or the work of European courts of law (—). For those who have an eye for this type of justice, there is much to

be learned from adat decisions in which the ordinary jurisprudent can find 'nothing juridical'.

(—)

d) The ascertainment of facts

How does a court which has to apply adat law establish the facts of a case? The question may best be answered by beginning with some negative observations. The first is that special procedures for what we distinguish as civil, criminal or administrative matters have not been found in adat law. (—) The second concerns the [*284*] absence of a burden of proof in the Dutch technical sense that, as regards each fact relevant to the dispute, one of the parties (including the public prosecutor) is required to prove it, while the other need merely deny it or remain silent, and that the court must consider the point not proven if the former party fails. (—) The rational core of this principle — i.e. that the party alleging something usually has the best means to supply the facts, and that the court therefore expects him to do so — may be recognized generally in adat law as much as in international law; but this is not the same as having an explicitly formulated rule. (—)

[*285*] A third point of difference concerns the court's attitude to the acceptance of truth. It is passive in our courts, where facts agreed upon by the parties in a civil action are judicially assumed to be true. [*286*] Neither the judges of government native courts, however, nor those of indigenous courts, are expected to be passive: the mere fact, therefore that evidence presented by one party is not disputed by the other is not sufficient for these courts to assume that its truth is 'thus legally established' (for other views, see ITR 1921:51; 1926:520).

Finally, there is a difference as regards legal presumptions derived from fact or law. This aspect has been insufficiently investigated, but there is reason for caution. One repeatedly comes across forms of conduct which in adat law are actionable wrongs *per se,* but which would with us at most give rise to presumptions of some delict or other. Among these: going about at night in a strange village when there are no celebrations in progress; sitting armed under another's dwelling (thus being able to stab through the floor and sleeping mat); talking to a woman who is alone at home, etc. On the other hand, a number of legal presumptions known to us, such as that regarding the right of the landowner to the crop standing in his field, are foreign to adat law. Furthermore, if Minangkabau or other maxims seem to contain legal presumptions, it is questionable whether these

should prevail unless the contrary is proved conclusively. Admittedly, there is — as with the burden of proof, — a rational core in some western legal presumptions which can be turned to advantage by a judge applying adat law, but he need not feel that his hands are tied by this. On the other hand, he must accept as presumptive of common descent the fact that a Minangkabau lies in the burial ground of a particular family or family branch; as indicative of social rank in South Sumatra or in Ambon the dress or position a person assumes at adat festivities; in the Lampung area, the right of a man to coconut trees he has planted as indicative of his right to that land; or, as presumptive of culpability for death in South Borneo, the ascription of blame by the dying man.[11] (—)

[*287*] As the adat judge is not supposed to be passive in matters of evidence, it is he who determines the sufficiency of proof. Willinck (1909:911f.) rightly stresses that the adat judge will never demand evidence of facts he himself knows to be true; the question is how often this is the case. Nor is evidence required of facts generally known. Where proof is needed it is up to the judge to elicit it to his own satisfaction; and to decide whether in the event of uncertainty he must give a conciliatory judgment. The Balinese Hindu priests are said to proceed formalistically when acting as judges, but this sheds no light on the Indonesian way of providing evidence.

If the means of evidence are ranked according to their weight in adat law, the scale will be very different from that in western law. Confessions, allegations, and denials, where possible supported by visible signs, rank first and may by themselves be conclusive. Immediately thereafter follows the ordeal, with its important constituent of the conclusive oath. The testimony of witnesses comes next; and — understandably in a country of illiterates — written evidence is at the very end of the scale. Although written official records of facts may not have been unknown in the adat law of evidence, they did not play an important role.

This ranking order will become clearer when the various means [*288*] of evidence are discussed in turn, but it may be useful first to explain the importance of the ordeal and the conclusive oath. Western readers might well believe that even in oriental trials these two would only serve as a least resort when all other means had failed. Such a conclusion would, it seems, be premature, at least for a number of areas. Even if it were insufficiently established that,

for instance among the Germanic peoples of the past, the divine ordeal was not a means of obtaining evidence, but the trial itself (Lambert, 1903, I:723-30), an enlightened reader could understand that in a world believed to be controlled by deities especially interested in the terrestrial affairs of their descendants, and in which divine favour or disfavour constitutes the weightiest sanctions in adat law, ordeal and conclusive oath — with the prospect of an infliction of divine vengeance — are a rational and understandable means of giving supernatural powers an opportunity of striking directly at guilty persons, and one which need not be a last resort at all (—). In many places, including the central Javanese principalities, the conclusive oath is still common in the indigenous administration of justice (—).

[*289*] It will be useful now to examine the place of each means of evidence in the adat process (—).

(1) *Confession or admission by an accused party, with or without visible tokens.* However important this means of evidence, little is reported about its significance and effect (Willinck, 1909:912-3; Ter Haar, 1921:162; Korn, 1924:254-5).

[*290*] Adat judges saw no objection to confessions under torture (Wilken, 1912, I:484) — how long, indeed, were these not used in Europe?

Confessions or admissions can even be made, without speech or writing, by a stereotyped act accepted by adat law — e.g. the non-judicial recognition of an illigitimate child in Minahasa [by the presentation of a symbolic gift to the newly-born child or its mother].

It is not generally true that confessions or admissions end the process; their purpose may in fact be to elicit a formal judgment. That voluntary admissions of guilt might be insufficient would probably be inconceivable to juridically untrained Indonesians. (—)

(2) *Allegations, whether or not supported by tokens.* Visible tokens *(tanda, bendö, sande agong, bukti,* etc.) have special probative value. For allegations by litigants (and witnesses?) to be valid evidence in Indonesian adat law, they are often required to be accompanied by some tangible or visible proof, such as the body of the slain man, a blood-stained knife, a piece of clothing, the stolen chicken, a woman's pregnancy, the bond-sum of the transaction, the betrothal pledge, a tenant's annual recognition token, the tresspassing cow with rice ears caught in her halter, or the duck with traces of forbidden food sticking to her neck. (— —)

(3) *Denials,* substantiated by argument and sometimes by physical

[*291*] tokens, will nearly always require corroboration. It is conceivable, however, that in special circumstances, such as the non-appearance of the plaintiff or the manifest lack of any foundation for his claim, the adat court will declare itself satisfied with a well reasoned denial.

(4) *Ordeals and conclusive oaths.* The very word ordeal arouses immediately the prejudice of contemporary readers; we have already touched upon the Indonesian conception of it.

Ordeals used to provide a ready stick with which to beat the traditional administration of justice (about which virtually nothing was known), as if they were a dominating everyday occurrence in adat justice (—). They were abolished, usually explicitly by ordinance or regional instruction, in the [supervised] indigenous courts (Mieremet, 1919:101; cf. Geurtjens, 1921:204-5), and presumably never tolerated in government courts — though one can never be certain about past times or remote areas.

[*292*] The utter revulsion of a western administration from the genuine ordeal — e.g. the notorious trials of werewolves and witches among the Toraja — need not be felt with regard to the conclusive oath, though to the Indonesians it is, with its supernatural sanctions, just another form of divine ordeal. If the court's own knowledge of the facts is inadequate and a confession is not forthcoming, or if an allegation or denial fails to convince, one of the parties must submit to taking the oath in support of his statement, on pain of suffering divine retribution against him or his relatives should he have lied. Willinck maintains (1909:934, 937, 940f.) that among Minangkabau only a defendant or accused can be made to take the oath, which thus becomes essentially a cleansing oath, but this does not apply to the Karo-Batak or Balinese. The main thing is (as Marsden already pointed out in his *History of Sumatra,* 2nd ed. 1784) that an oath-taker is so convinced of the righteousness of his cause as to be fearless of divine retribution. (— —)

[*293*] Government regulations for the indigenous administration of justice have usually no provisions relating to conclusive oaths; the district and regency courts in Java and Madura are likewise left free whether to use them. The cleansing oath is still, and effectively, employed in Javanese villages (Holleman, 1919:179; for Aceh, see p. 74, above). (— —)

(5) *Evidence of witnesses.* The preference for spoken over written [*294*] evidence is natural in a country of illiterates, and for the

Moslems among them is perhaps reinforced by the explicit prejudice of Islamic law against written evidence.

[295] Witnesses are of two kinds: chance witnesses of whatever kind of permissible or impermissible act of conduct having legal consequences; and the prescribed witnesses of legal transactions.

The basic principle of chance evidence is the same as everywhere else in the world: the witness must say what he knows and how he came to know it. Obviously it is an advantage with this kind of evidence that in the small circle of an Indonesian village everyone knows everything; a judge who shifts his inquiry to the village or place where the dispute originated soon has the benefit of the people's familiarity with the facts (—). A second advantage of oral evidence in adat law matters is the exceptional memory of illiterate Indonesians — and Chinese? — which has so often been attested to. A major disadvantage, however, is the untruthfulness of many incidental witnesses, whether due to fear of the party against whom they would testify, or to some other reason. This serious problem (—) cannot be solved by swearing in witnesses in Islamic or other non-indigenous fashion. This is to no avail, and merely frightens them; and there are enough remedies known to them to counteract such oaths — assuming the latter are believed to have any power at all (—). A much-feared adat oath, administered after the testimony, might be more effective, although against this, too, objections may be raised. (— —)

[297] The evidence of prescribed witnesses works differently. It has been noted earlier that the prescribed adat witness, whether a headman or ordinary villager, probably serves a different purpose from that of formally required witnesses in our law. His presence is demanded not as formality or for giving evidence; it is to support the transaction by testifying that he holds it to accord with adat law, and that he will not dispute it at any future time. Adat law repeatedly prescribes whose presence and attestation is required. In land matters it is those with rights to neighbouring fields; in family matters it is the family or other kin group, whose presence then usually coincides with the holding of a sacrificial meal in honour of the ancestors. In village matters — in the very broad sense in which this was understood in Aceh and Central Java — it is the village authorities; with the establishment or affirmation of village boundaries in Bali, the villagers themselves. All this does not seem to exclude the possibility that in most cases people can either select their own witnesses, or

add some of their choice to those prescribed — the point needs to be examined more widely and thoroughly. Also with prescribed witnesses the accuracy and retentiveness of their memories can be relied on, the more so because their testimony may have to be delegated [to a son, or to a successor in office]. Such delegation has presented problems to western lawyers, who are apt to think here of hearsay evidence. But it is something quite different: the faithful reproduction [*298*] of the evidence of a direct witness, which is as solemn and impressive as the statement deliberately made by a dying illiterate to his illiterate death-bed attendants. (— —)

(6) *Written evidence.* Indigenous legal documents, declarations, [*301*] records, rank low on the scale of evidence, far beneath confessions, conclusive oaths and the evidence of witnesses; they are less frequently used, but they do exist, and have done so for a long time. (— —) Their form and content may not be immediately clear to a westerner. They are usually neither bilateral declarations nor written arguments, but unilateral statements signed by the seller, pledgor, [*302*] lessor, etc., and intended to be placed in the hands of the buyer, pledge-taker, lessee. To a westerner looking for contracts or receipts in writing they create a topsy turvy impression: a person who hands over property would seem more likely to be wanting some proof of this than the recipient; and the owner who permits another the use of his land for a lengthy time would seem to be in greater need of retaining some power — in a mystical sense — over the tenant than the other way round. Holleman's ingenious explanation (1924:470, 480f.) may well be true: the purpose of the document is to stress the fact that the natural tie between owner and land is being replaced by the artificial tie between tenant and land; signed by the owner, and to be kept by the tenant, the document in a sense embodies the owner himself and his controlling power.

The paper is usually countersigned by 'witnesses' (*saksi* — a term which, for reasons explained before, should here rather be translated as 'collaborator'). The mystical power ascribed to such declarations may be enhanced by the use of some pompous phraseology, at the cost of the clarity of their contents. (—) Apart from such embellishments, the cunning abuse of legal terms ('sale' instead of 'lease'; 'ownership' instead of 'tenancy') may further obscure the real meaning of the document (—).

[*303*] Although village authorities and other adat heads may have been connected with it, such written evidence cannot be regarded

as an officially attested deed in our sense, the 'warranty' of a village headman simply not being comparable to a public official's attestation in our law. [Nor should the wording of it be taken too literally], for as Holleman has written, 'The idea that a judge would have to interpret the document according to the letter of the text does not enter an ordinary villager's mind'. (—) It would therefore be no luxury to make an appropriate provision for this indigenous form of written evidence in our judicial regulations for adat cases (—).

[*304*] What then is the probative value of such documents in adat law? Exactly the same as that accorded by a European lawbook to incidental communications (letters, telegrams, notes, tallies), or in other words: whatever value a judge in good conscience thinks he can attach to it, from slight presumption to conclusive proof.

(— —)

e) The ascertainment of law

[*327*] There remains the question of how a present-day court in Indonesia (whether an indigenous, government, or religious court) finds the applicable adat law. It should be remembered that adat law frequently directs the court to 'find' the appropriate law for particular cases within a frame of broad adat prescriptions to effect a settlement if necessary.

How would a truly indigenous court arrive at the applicable law? It may consist of a single man, or group of men, so thoroughly versed in the legal norms at every level within its area of jurisdiction, that it needs to inquire no further; this will be true particularly in areas where the judges are socially not far removed from those who seek their justice. But the opposite does also exist, and may even become commonplace: there are numerous examples of government courts in Java whose Indonesian members from the aristocratic class are ignorant about usages and colloquial terms at the village level; moreover, even headmen versed in adat law may lack insight into intricate questions (Holleman, 1923:85f.). In such cases, what should courts do to find the law?

(— —)

[*328*] Several questions arise here which are similar to those pertaining to the ascertainment of some European customary law or of foreign law in disputes with international dimensions. May the court require the parties to prove the law? To what extent may it leave proof to them if they have volunteered to provide it? How far is the court left free to pursue its own initiative in the matter? In all these questions

it is necessary to penetrate to the essence of the problem through its formal wrappings.

(1) *Instructing the parties.* Does the court surrender its responsibility as soon as it invites an Indonesian or Chinese litigant to present such factual evidence (through witnesses or otherwise) as would prove the existence or probable existence of an alleged customary law? By interlocutory order the superior court at Batavia in 1915 instructed the local government court at Menggala in southern Sumatra to invite the appellant to produce witnesses in support of his allegation on adat law (ITR, 1915:602, 606); in 1918, the superior court at Surabaya instructed the regional government court at Jombang to have an important point of adat law clarified at a public session (AB XIX:462f.). The formulation of the orders may not have been without danger but their purpose was unexceptionable, for in both cases it implied an independent inquiry by the lower court. Things start to go wrong when judicial regulations relating to proof of a subjective right are applied without more ado to the ascertainment and consequent application of the objective law, for the facts proved by a plaintiff do not provide the coherence and comprehensiveness which a court would need to deduce the existence of an objective rule of law. (— —)

[*330*] As regards objective adat law, there is no statute expressly requiring, or permitting, litigants to furnish proof of it; as for the Indonesian or Chinese law of ancient times it would be unthinkable to impose such a burden, as the effect would be to throw the application of adat law into confusion (—). Information submitted for the court's consideration is still desirable (—), and can even be solicited by it; but litigants are not required to establish what is the law, for that is and remains the court's duty.

(— —)

(2) *Accepting the parties' assistance.* May judges accept an offer by the parties to furnish proof of the objective adat law, and then rely upon such proof? (—) In 1903, a superior court at Batavia rightly held that the local court at Kalianda was free not to accept a counsel's testimony on women's inheritance rights in the Lampung districts, and that, if it disbelieved the purport of the evidence of the parties' witnesses, it could determine the customary law according to its own [*332*] insight and knowledge. (—) This does not mean that a court may lightly dismiss a well reasoned statement on adat law, and substitute for it an oracular pronouncement of its own. In a Minang-

kabau dispute heard before the *rapat* court at Maninjau in 1890, the issue was whether land and movables left by a man whose branch of the family had died with him, could devolve upon another family branch not of the same village. The *rapat* ruled that this was possible, and its decision was, among other considerations, 'based on the testimony of the witnesses heard by it'. The ruling was quashed by the superior court at Padang in 1892, as 'not . . . in accordance with the trend of development among the Malay population of Sumatra's West Coast, and therefore no longer valid adat'. The court also dismissed the evidence of the witnesses on the ground that 'adat law is not established by witnesses, but is a matter of *jus curia novit*'. The government adviser, Snouck Hurgronje, denounced the Padang court's judgment as arbitrary and as a serious threat to adat law, but both the Director of the Department of Justice and the Supreme Court at Batavia agreed (1893) with the ruling. The two views are not [333] mutually incompatible: even though a court, being responsible for ascertaining the objective law, is neither bound by the evidence of witnesses nor obliged to reveal its own sources of knowledge, it cannot depart from sound advice except for good reason; and the proposition that adat is not proved by witnesses would hold good only if 'not' were to be replaced by 'not conclusively'. But it would be desirable for the second controversy to be solved by statutory regulation.

[The courts can also initiate inquiry into the objective adat law by calling expert witnesses, as has repeatedly happened in Chinese law suits, and — though perhaps not often enough — with the ascertainment of Indonesian adat law. Numerous examples are on record — see Van Vollenhoven, 1931:333-36.]

(— —)

f) The Judgment and its Execution

[378] Judgments of traditional courts often had to be made unanimously; how, and to what extent, they have changed to majority decisions needs further research (—).

The deliberations were quite often public; whether this was the general rule, occurring also with Balinese priestly tribunals and Javanese princely courts for instance, likewise requires further investigation.

The process is started by a complaint or a petition for legal redress, and the aim of the action is to bring 'peace' — the judgment reflecting this aim (above, pp. 232, 243f.) implies, among other things, that the

matter is brought to an end in every respect between all parties involved.

Once it has accepted the processual pledges, it is the duty of the court to finalize the matter; failure to do so would amount to refusal to do justice. The consequences of refusal to hear a case never seem [*379*] to have been recorded. In spite of this, it appears that in Java and elsewhere adat judges can refuse to deal with matters which they consider to be stale or contrived — a 'dirty' case (*ranān kotor*) as the Karobatak say, or 'prescribed' through time (*kedaluarsa*) in Javanese (—).

The general terms for finding against the petitioner or claimant seem to be *tolak* or *mengalahkan,* without a distinction being made between no competence, not judicable, dismissal, acquittal, etc. (—)

There is no reason to assume that purely declaratory judgments are unknown or not permitted. On the contrary, in questions concerning uncertain boundaries, or privileged adat costumes, or caste status in Bali, and so on, one can easily imagine the need for such jugdments.

(— —)

[*380*] Traditional judgments are almost always unwritten, even in the village courts of Bali. (—)

Except for a Toraja rule allegedly forbidding the re-opening of a [*381*] decided case, there appears to be no explicit adat rule about the binding nature of a decision once it is given (—). Usually, courts assume this to be so, if only because it seems reasonable; but should it transpire to be unreasonable in a given case, they seem to be free to act otherwise without undue formality. (—)

Voluntary or forcible compliance with the judgment is apparently often not the concern of an adat court, whose task is accomplished when it has pronounced judgment (though one gets a different impression in respect of certain cases in Aceh and Bali). This fact, too, leaves its imprint on the adat administration of justice, and its effect deserves further investigation (—). But even where the execution of judgments is not, or only rarely, considered to be a function of public authority, the fear of divine retribution, or of being found guilty of lack of respect for headmen, or of risking banishment, acts as sanction (—). Today, petitioners in both indigenous and government courts often aim at some form of distress (AB XVIII:48), and a successful claimant can usually obtain the right to distrain upon the judgment debtor's goods and occasionally even his person (e.g. putting him in the stocks).

(— —)

4. *The binding character of adat law*

[397] There are three grounds on which all that has been discussed so far might still leave room for doubting that adat law is truly law.

The first would be the belief of some that customary law must be based on immemorial custom — did not the Romans require *inveterata consuetudo*? — and that, since adat law apparently can also be new law — it cannot, in the latter case, claim recognition on the grounds of being 'customary'. This point has been discussed before (pp. 218ff.). [The people of the village who voluntarily observe the ancestral adat law, their adat heads who attest the observance of it and the courts which dispense justice in the spirit of adat law, they all see — as was said of Punjabi law at the Simla conference in 1915 — how adat law grows under their own hands. Also Westenberg in his study on adat justice in Karoland (1914) repeatedly stresses that adat law is a living, growing thing, and that adat judgments create new law.] * Moreover, section 31 of the Indies' new Constitution of 1925, — by speaking of 'the legal rules which the people observe in relation to their religion and usages' — gives such a narrow interpretation as little support as do the various regional judicial regulations; and the fact that the old provisions of 1848 and 1855 pointed to the preservation of adat law by no means implied that no new law could be evolved in the familiar manner of all customary law.

Secondly, it might be argued that the mediatory nature of the adat process indicates the absence of objective rules of law. In a circular of July, 1919, on traditional land rights, the Resident Commissioner of Manado wrote: 'These so-called rights mean really nothing but the absence of rules of law. As no rules are fixed, everyone does as he thinks fit, and considers that his right.' In similar vein it is often alleged that an adat law which needs to be found or shaped by the court in virtually every case cannot, for this reason, be a pre-existing operative law.

Thirdly, and most importantly, one could argue that only a small part of adat law is regularly dealt with by the courts, that we have only an imperfect knowledge of what this part involves, that custom without judicial sanction is not customary law, and that it is therefore in only a small minority of cases that we can be certain of dealing with a binding adat law.

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* [The aforegoing passage is from page 389, not included in the present selection - *Ed.*]

[*398*] It would serve no useful purpose here to review the theories of customary law of German and other scholars: Suárez, Savigny, Puchta, Maine, Zittelmann, Lambert, Duguit, Krabbe, Kranenburg, Kelsen and so many others. All their theories appear to have been dialectically deduced or logically derived from arbitrary premises; not one is founded on the observation of reality. (—)

We shall not join this chorus. We shall instead assess the importance of the question, and then see what reality has to teach us.

The question becomes relevant mainly where subordinate *legislative* bodies are instructed by a superior authority to respect adat law. As far as we know, no *court* required to apply adat law and aware that the people under its jurisdiction have established rules of behaviour which they consider binding and proper and which they expect headmen and other authorities to maintain, has ever asked: 'It may well be custom or usage or popular morality, but is it law?' But when the agrarian section 62 of the *Regeringsreglement* (later section 51 of [*399*] the new Constitution of 1925) adjured the local authorities to make no inroads on the 'indigenous (land) rights of the people', the common counter-argument was that certain areas quite possibly had ancient agrarian practices, customs and rules — generously tolerated by our administration — but the people should prove that these could rightly be regarded as customary *law*. If this 'proof' had to be furnished from the recorded judgments of the last fifty or a hundred years, then the result would be tantamount to rejecting the claim. (—)

Nobody denies that Indonesians regard the violation of certain rules and institutions as contrary to the will of the ancestors and hence disadvantageous and dangerous, and that they therefore demand that their own authorities punish any breaches. Now if a rule is so deeply ingrained that no one would dream of breaking it, with the result that nobody remembers it to have been judicially affirmed, would it therefore not be adat law? If rules about the payment of bridewealth or the dissolution of marriage, for example, are so well protected by the authoritative guidance of headmen and elders — much more important here than adjudication in the narrow sense — that no judicial action to obtain their observance can be remembered, would they therefore fail to qualify as adat law? Whenever a true adat judge has before him a case, and nobody remembers a like case to have been decided, is he to turn the petitioner away on the pretext that, though a custom may have been violated, there has been no breach of law? — as though every question of law did not have to

be raised for the first time! If a government court in Java has to decide an issue of inheritance in which Islamic law competes with indigenous, would it not suffice for the court to find out how such conflicts were conceived and resolved year in and year out by the people themselves in their villages? Or if this court had to unravel a tangle of locally adapted Chinese law and south-Chinese law, might it not ascertain how the Chinese community concerned deals with such matters and how this relates to its social structure and the rest of its way of life?

[*400*] When Struycken (1914:17) wrote that the more realistic wind blowing through legal science was 'driving away the ultra-legalism of the 19th Century', he could have added that it is not only the dogmatic faith in statute law that is shattered when reality is revealed, but also an exclusive belief in case law. In expressing his aversion to all the vagueness peddled in the name of a sovereign 'legal consciousness' he was fully justified in writing that, 'so far as social life contributes independently to the formation of law, it is seldom if ever in formulating specific legal *rules,* but rather by forming *concrete* legal relationships, contracts, practices, institutions and the like, from which experts must still elicit legal *rules* through a process of juridical abstraction' (ibid:22). This is no different to the conclusion to which Bryce (1901, I:333-5) had come on the relationship of living folk-law to governmental power in mediaeval Iceland.

The right way to discover what is adat law is by meticulous and extensive enquiry into how, in a given area, matters of consequence for the legal order are usually done or tolerated as being normal and pleasing to the ancestors; and how, in cases of deviation, fellow villagers or adat heads, or occasionally the courts, react [see *Annex A*]. What enables us to ascertain (—) the fabric of a people's customary law is the interplay between one normal custom and other customary practices on the one hand, and between customary practice and disruptive deviation on the other. Even approbation and disapprobation, if inextricably associated with precept and prohibition in popular thinking and conduct, are law and not merely morality; for in adat law there is nothing vague about approval and disapproval. An adat judge examines this interplay as a matter of course, and, with the mediatory and judicially creative powers at his disposal, determines what could be considered normal peaceful usage acceptable to the

ancestors, or disruptive deviance which he could not possibly ignore. To dismiss land rights of long standing as nothing more than tolerated [*401*] custom, thus equating them with a student's or a commuter's right to a particular seat in a lecture room or railway compartment, is to ignore all that Indonesian practice teaches us about the rule and power of a court of law.

The only thing that can truthfully be said about judicial influence on the distinction between custom and law is that the courts have the final word when doubt arises whether a practice is mere usage or an enforceable right. But however important that may be, it is quite different from the juristic dogma that customary laws obtain their validity by judicial recognition, or at least should be ascertainable from a succession of judicial verdicts.

But although scarce or even erroneous case law will not abrogate a customary law which is clearly living, no one would doubt the importance of the support which courts can give (—). And if it is true that in the big Europeanized cities and among the handfuls of [*402*] emigrés and Christian Indonesians little can be expected from the voluntary observance of adat law or its attestation by adat heads — and the same applies to the Straits Settlements — then it follows that for these areas and people the courts assume greater significance than they do elsewhere. For elsewhere, courts are only one — and not the most important — of the supports of adat law, and even their defects need not dislocate it; but here, there is the danger that adat law will stand or fall with them.

CHAPTER IX

EPILOGUE *

[September 1931]

Spera prudenter

[*878*] It cannot be stressed too strongly that, whatever measures might be devised to promote the well-being of adat law, its future depends on its own usefulness, capacity for development and innate resilience. The fate of adat law does not lie in the hands of policy makers at Buitenzorg ** or The Hague, nor with the practitioners and scholars whose hearts have been won for the cause of adat law, but with the Indonesians in their villages.

The problem cannot be solved by codification, or replacement, or unification, or partial retention of adat law, nor by such revision or publication of it as jurisprudents or policy makers see fit to make, but only by the people's own will to maintain, expand and rejuvenate their law.

Should the authorities decide to maintain adat law, and yet it withered, no decree would save it; should they decide to reform or replace adat law, and yet it retained its youthful vigour in village, field and market place, no court could restrain it. It was in this vein that Snouck Hurgronje (1900:223-4) and Vergouwen (1930:73) warned that, to an Indonesian, reforms are devoid of soul and life if he has had no hand in them. Besides, what western president of an oriental court, what western draftsman of adat legislation, would not realize the precariousness of *his* efforts to invent new oriental law?

The old private law of Holland and West Friesland would have fared a good deal worse in competition with the law of ancient Rome [*879*] had not Grotius in 1631 summarized and handed down this Dutch adat law in a clear language and lucid system. The old customary public and private law of Britain might have faced odds too

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* [Original title: 'Adat law the concern of the people'.]

** [Seat of the East Indies Government; now Bogor.]

heavy for it in the whirlpool of late eighteenth century rationalism had not Blackstone's gift for language and orderly arrangement in his *Commentaries* (1765-9) brought this law home to the educated classes at the right time, captivating their interest and inspiring their love. And was it not a copy of Blackstone which opened young Abraham Lincoln's eyes and heart to the attractiveness of this British adat law? The question is not whether Anglo-Saxon countries have had no greater juridical scholar or better legal analyst than Blackstone — he himself quite rightly wrote at the end of his foreword that 'the candid and judicious reader will make due allowances for the difficulties of a search so new, so extensive, and so laborious'. With his striking classification and tasteful style Blackstone rendered an inestimable service to his country's unwritten law. But this could only have been accomplished by a son of the land writing in his own language.

To value the adat law of Indonesia as a living thing to be treasured by the mass of the people — indispensible if it is to be preserved and further developed — lies beyond the power of a book written by a Dutchman for Dutch readers. Only a Buginese or Javanese Blackstone, a Minangkabau or Balinese Grotius, could do this. And might not a book like that even enhance a national sense of justice, such as Euripides inspired among the Hellenes?

So far, Asia, North and Central Africa, and Madagascar, have been allowed to keep the oriental or tropical character of their law. On the other hand, Europe, North and South America, Australia and New Zealand have definitely adopted one or other of the western legal systems. As for the future of tropical law in the remaining third part of the world — Central America, South Africa, South Oceania — one can speak only with uncertainty and hesitation.

[*880*] But this at least may be assumed with some confidence: new times will be distinguished from old not by this or that government measure, but by a changed mental attitude of westerners and western-educated orientals to oriental values — an attitude based no longer on a spurious superiority, but on respect.

Annex A

ADAT GUIDE *

(Practical hints on the investigation of adat law)

I. Subject of the investigation

1) The best way to find an adat rule is not to ask the people about the rule itself, but to observe how they handle certain cases in actual practice. Therefore, only ask for information on facts and solutions, and above all, do not ask about this or that system.

2) If it appears that something is done in different ways, all should be recorded, even if the people regard one way as right and the others wrong.

3) If new usages are observed beside traditional customs, try to discover the practical usefulness of the former and the motivations leading to their adoption, even where they are said to be a degeneration of the old adat.

4) Just as important as the investigation of adat law that has developed peacefully and uninterruptedly in indigenous society, is the investigation of adat laws that have originated under abnormal circumstances — missionary activities, emigration, dispersal to new settlements, intermingling of peoples, etc.

5) In recording the results of the research, a sharp distinction should be made between what has actually been observed and the personal comments — either of the researcher or of the informants — on the observed facts.

6) If adat law seems to make no provision for a particular point, do not record this conclusion until you have tested its validity by further inquiry in which the facts or questions are presented in a different way, or by making inquiries among other people. Report what questions were asked, how they were put, and from whom the information was obtained.

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* [This Guide was first printed and distributed in April 1910; it was also included in the first *Adatrechtbundel* (1910) pp. 16-20.]

7) Be aware that there can be a great difference between adat law as actually practised and as enunciated in written regulations (*undang-undang*, etc.) or in princely edicts.

8) Bear in mind that, though adat proverbs (*papatah*, etc) are significant and therefore worthy of record, they are not to be treated as articles from a code of adat law. They are, on the contrary, merely embellishments of adat lore, and are often obscure, pedantic and ambiguous embellishments at that.

9) Take care to note whether some aspects of actual adat practices may or must be regarded as the result of government measures or regulations.

10) Note the prevalent indigenous terms, as well as the alternative use of different but not sharply distinguished terms. Do not be tempted to construe the nature of a legal relationship merely on the strength of a certain terminology;[1] and concentrate on the actual manner of solving disputes rather than on the juridical nature which indigenous informants impute to such solutions.

II. Method of investigation

11) Adat research is an art which must be learned with practice: patience and good humour are essential to it. Of great importance is the way in which questions are framed. Apart from a knowledge of the colloquial language and usages of the country, one must have the ability to converse easily with simple folk and to win their confidence.[2]

12) The less obtrusive the inquiry, the better. This applies especially to areas where investigations of one kind or another have already been made among the people.[3] Older folk in particular, if encouraged to do so, will discourse at length on the history of their village or tribe. These stories often provide cues for eliciting more information about local customs without appearing to do so.

13) Generally it is best to pursue the point of adat you wish to establish in an area where European influence has not yet impinged too much on the indigenous way of life, for example, in a dozen or so outlying villages, or if the subject lends itself to it, among all the families in these villages.

14) The research may be facilitated if the knowledge of adat law gained in another area is used as a guideline, in the sense of checking, point by point, whether what has been found elsewhere also exists here.

15) If questioning is necessary, take care never to rely on a single spokesman or spokeswoman (women are often repositories of old concepts and stories), but always test the opinions of one informant against those of many others.

16) Usually an inquiry will be more effective if people are interviewed one by one or in small groups of three to five, than by consulting them in larger gatherings or meetings (e.g. of a village as a whole). With the latter, one must be very careful that a few overbearing characters do not dominate the others.

17) Where, in an area of manageable proportions, there are relatively many headmen in a small population (e.g. in the Minahasa), it is less risky to rely on their information than it is in large areas (e.g. Sumatra's West Coast), or there where relatively few headmen live rather aloof from the ordinary people (e.g. Java). But headmen, too, are often not impartial informants: they are likely to have a vested interest in a particular answer, either because their personal or family interests are best served by it, or because their own actions and decisions are thereby presented in the best light. The information by headmen therefore also needs to be checked.

18) Wherever possible, approach each question in two or more different ways.

19) If the answer proves to be doubtful after questioning various people, do not force the issue but accept such uncertainties as have emerged.[4]

20) Where the answer to a question is evidently meant to be vague, accept it as such.[5]

21) Where inexplicable things crop up in adat law, for which also the people themselves have no explanation (like the rule in Gayoland that the youngest son inherits everything), ask yourself whether the rule is perhaps understandable when it is brought into the context of other indigenous institutions.

22) Never — as nonetheless so often happens — pretend to know better than the people themselves if they have with certainty stated the actual facts of adat law.

23) Never ask a question in a way which enables the person being interviewed to guess what answer is expected or desired, otherwise you are likely to receive the desired answer purely out of politeness or docility.

24) Avoid western concepts and distinctions. If the import of a question is clearly not understood, ask yourself whether it is perhaps a question which simply does not fit into the indigenous pattern of ideas, for example because it is based on premises or distinctions which the Indonesian would never make or which he would make in a different way.

25) If the answers are strikingly simple and fitting, be wary.

26) As regards the administration of justice in the Outer Provinces, in areas where adat law is still flourishing, take note of what they

regard as adat law: whether it rests on commonly known adat rules, or on frequently occurring instances, or on previous court judgments (or amicable settlements), or on still other considerations.

Signed by the Commission for Adat Law of the Royal Institute of Indonesian Linguistics and Ethnology at the Hague: —

C. Snouck Hurgronje, *Chairman.*
J. H. Carpentier Alting
J. C. van Eerde
J. J. Meijer
C. van Vollenhoven, *Secretary.*

and by the Commission for Adat Law of the Batavian Society of Arts and Sciences at Weltevreden: —

F. A. Liefrinck, *Chairman.*
I. A. Nederburgh
G. A. J. Hazeu
P. de Roo de la Faille
W. Frijling
S. L. J. van Schaik
W. M. G. Schumann, *Secretary.*

NOTES

1 Think of the various, sometimes inexact, uses of the word *waris* ['inheritance']; or of the multiplicity of meanings of the term *lilikur* ['binding token'] in the Minahasa.

2 Think of the missionaries. Trust was built and confidences invited on journeys done together with the natives, by sharing privations, by concern at times of sickness or calamity, by devising means to make harvests succeed, by showing an interest in everything concerning the children.

3 De Wolff van Westerrode (p. 9 of his Report on the agricultural credit survey in the Priangan Regencies, Batavia, Government Printer, 1904), writes:
'Everyone who comes into daily contact with the villagers in the course of his business will confirm how difficult it is, even in relation to the most insignificant topics, to know how to elicit the truth from them. It seems, indeed, as if the numerous surveys conducted in the last quarter of a century have made the people suspicious and reticent to such a degree that every inquiry of an official nature, particularly in connexion with anything directly or indirectly relating to economic matters, leads either to lies or to an obstinate inability to understand.'

4 Take, for example, the power of the family head (*tua'n teranak*) in the Minahasa; here perhaps the uncertainty is due to steadily changing conceptions. Or take the question of recovering a deceased's unpaid debts.

5 For example: as to the stage at which children attain contractual capacity; or the question of incorporating extra-marital children into the family.

Annex B

PUBLICATIONS ON ADAT LAW BY C. VAN VOLLENHOVEN

A. Het Adatrecht van Nederlandsch-Indië

Vol. I (1918)
Vol. II (1931)
Vol. III *Opstellen over Adatrecht, 1901-1931* (1933)
(Collected essays on adat law: 1901-31)
Published by E. J. Brill, Leiden.

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NOTES

CHAPTER I

1 [Act No. 2 of 1854, replaced in 1925 by the so-called *Indische Staatsregeling* (Act No. 327/1925, *Wet op de Staatsinrichting van Nederlandsch-Indië),* both enacted by the Dutch parliament - *Ed.*]

2 [Van Vollenhoven's references were often exhaustive. For the purpose of this publication only a representative sample has been selected from the long list to be found in his *Adatrecht,* Vol. I, p. 6. - *Ed.*]

3 RNI 68(1897):299, 307; IG (1902)I:42ff.; Carpentier Alting (1902:88).

4 MZg 49(1905):236f.

5 Snouck Hurgronje (1893:16, 386; 1894:304, cf. 307 and 1893:374) — the English translation (1960) gives '*adat* law' —; 1903:55 (cf. 318); Nederburgh (196:71); Juynboll (1903:9, 223); Scheuer (1904:24).

6 In the circular letter of the Secretary of Justice [Batavia] d.d. 9/8/1904 — see also p. [35, above]; in two places in the preliminary reports of the Lower House on the previously mentioned bill to amend sections 75 and 109 of the *Regeringsreglement* (Bl. 1904-5, 121 No. 12:87, col. 1 & 2); and finally in the explanatory memorandum on the bill dealing with the training of civil officers for the Indies (Bl. 1905-6, 226, No. 3).

CHAPTER II

1 Mayne speaks of the 'Dutch Government'.

2 According to Dr Kern this means 'popular usage', i.e. adat, and the more accurate spelling should have been Tesawalamei. It should also be noted that, although Mayne claims to possess an 1862 edition of this law-book by H. F. Mutukisna, none of the papers in the Government Archives at The Hague, relating to Ceylon, contains any reference to such a codification.

3 RNI 8(1852):83-119.

4 And not Haksteen (see Tamson in TBG 39, (1897):511-15).

5 In 1706; *Plakaatboek* VII:392-407.

6 *Plakaatboek* XIV:93-94, 154; cf. Nederburgh (1904):411, 413, 414-18, 420-22.

7 See the Hazeu edition, VBG 55, II, 1905:119-123.

8 Printed as an Annex to the *Reports from Committees of the House of Commons,* 1772-73, vol. IV, a written copy of which exists among the manuscripts of the University Library in Leiden.

9 See: Jolly, 'Recht und Sitte', in Bühler's *Grundriss der Indo-Arischen Philologie und Altertumskunde*; Steele, *The Law and Custom of Hindoo Castes within the Dekhum Provinces,* 1868; Tupper *et al., Punjab Customary law,* 1881; Mayne, *Hindu Law and Usage,* (5th ed.) 1892; Kohler, in *Zeitschrift für vergleichende Rechtswissenschaft,* 7-11, 1887-1895; Rattigan, *A Digest of Civil Law for the Punjab,* 1901; etc.

10 RO: ss.7 & 8; ABW: s.11; etc.

11 cf. Keuchenius II, pp. 432, 525.

12 ibid, III, pp. 583, 626, 632, 682, 689, 691, 694.
13 cf. ISb 79/1855, s.10.
14 e.g. ISb 415/1902.
15 Snouck Hurgronje (1894):353; Er. (1876) I:2; Van der Lith (1882):219.
16 Snouck Hurgronje (1893):106, 58f.
17 Vol. I:182; Vol. II:260-62.
18 Vol. I:12-17, 74-75, 98-99, 358-59, 458; Vol. II:297-308, 346-73.
19 No. 53 (1899):136-39.
20 pp. 108, 319, 321.
21 Juynboll (1903:7-9, 262-63, 265*n*, 310-14).
22 e.g. in TBG: 33(1890):330-32, 344-47, 363, 372.
23 in: WA Vol. I (1896-98), part. I:17-78.
24 Carpentier Alting (1902) Vol. I(1):48, 56, 75, 137, 148, 149, (3):42, 53.
25 Bl. 1904-05, 121 No. 10, par 4, - 54.
26 Gunning (1905:219-20).
27 [So named officially, although the judge is neither a priest nor does he sit in council - *Ed.*]
28 MbZg 1904:167-68.
29 (Ed. Der Kinderen, 1872, e.g. 112-13, 143, 170, 179.)
30 ISb 1882 No. 142(j); 1883 No. 4.
31 See the judgment in RNI, 76(1901):75-76.
32 See further: Van den Berg (1895:308-12, 301-03); Enc. N.I. (1896:8, 'Adat'); (1899:541, 'Mohammedanisme').
33 Van den Berg (1901*b*:1-80, cf. 1899:567; 1897:83-181; 1892:454-512; 1895: 291-314; 1896:541f.).
34 IWR No. 758.
35 Snouck Hurgronje (1893:12), (1894: ch. IV); Piepers (1895:149, 150-52); Nederburgh (1896-8:17-18); Bergsma (1896-8:205-08); Van der Lith (1882: 217ff., 221-3, 226, 238); Van Ossenbruggen (1902:113); Day (1904:28).
36 Verslag UZV (1905:13-14), cf. Nederburgh (1905-06:2).

CHAPTER III

1 [The popular name of the ill-fated bill of 1865 to 'determine the principles for the establishment of agricultural and industrial concerns in the Netherlands-Indies'. Tabled by Fransen van de Putte in September 1865, it was withdrawn in May 1866. The lengthy debates on this bill were separately published in three volumes - *Ed.*]
2 cf. *Handelingen,* III:258-267, 446-48, 578-84, 761-63.
3 [This term, and the two subsequent terms italicized here, are used in a technical sense. Van Vollenhoven devised the following terminology for his geographic delimitations:
rechtsbekken (lit. law basin) - law region
rechtskring (lit. law circle) - law area
rechtsgauw (lit. law county) - law district - *Ed.*]
4 [Such memoranda were written by out-going administrative officers for the guidance of their successors, and usually contain a summary of the former officer's work and experiences in the area, and a description of local conditions and problems. - *Ed.*]
5 Ordinance of 30/10/1827, supplemented by a local decree of 28/11/1835. (-)

CHAPTER IV

1 [It is a tribute to Van Vollenhoven's perspicacity at this early stage that his schema was never seriously challenged by the increasingly rich results of the field research he stimulated in the next few decades. - *Ed.*]

2 [The literal translation of *beschikkingsrecht* would be 'right of disposal', and of the concomitant *beschikkingsgebied,* 'area of disposal' or 'disposal area', terms actually employed in the English translation of Ter Haar (1939) — see footnote p. 43, *supra.* Van Vollenhoven, too, once used 'right of disposal' (in quotes) in a contribution to the *Illinois Law Review* (XIII, 1918 — John H. Wigmore festival publication). However, the Dutch substantive *beschikking* (from the verb *beschikken* — to dispose), when used with reference to property, is not free from the connotation of alienation, and this connotation is perhaps even more marked in the English 'disposal' (slightly less so in 'disposition' — see *Shorter O.E.D.*). The Dutch term raised some controversy — not least because it struck at the roots of a long-standing misconception of fundamental Indonesian (adat) land rights by legislators and administrators, which had led to some gross infringements. Van Vollenhoven himself admitted that the term was 'ambiguous and obscure', and to clear up confusion he succinctly enumerated six characteristic features of this *beschikkingsrecht,* one of them being that, under Indonesian adat law, a jural community could *not* permanently alienate its territory (1909:19-20). The term has since become firmly entrenched in the technical vocabulary of Dutch adat law studies (and even in legislation) — see Ter Haar (1939:54f.).

'Right of avail' (the term has a somewhat archaic flavour) has recently been employed in some English legal anthropological writings. Coined by the present editor (who himself did not use it specifically until 1969 — Holleman, 1969:88), its consistent usage was first adopted by A. J. B. Hughes in his studies on African land tenure in Swaziland (1972) and Rhodesia (1974). Following Hughes, I. Hamnett (1975:65f.) has applied it to Sotho land rights, but without stressing its communal conception. Its most recent application is by F. von Benda-Beckmann (1979) in his study of property among the Minangkabau. - *Ed.*]

CHAPTER V

1 Vol. I, 1893; Vol. II, 1894; English edition (*The Achehnese*), 1906.

2 But excluding Singkel, as well as Gayoland and Alasland, an administrative division under (without actually being part of) Aceh since government decree No. 18 of 19/9/1903. (-)

3 See vol. 55 (1903):53-249, 363-401; 56(1904):587-602; 61(1908):589-667.

4 See map at the end of volume I of *The Achehnese,* 1906.

5 [These sections reflect some fundamental premises of Dutch colonial policy as regards indigenous institutions in the East Indies. They read:

S. 67: 'As far as circumstances permit the native population shall be left under the direct control of its own leaders appointed or recognized by the government, subject to such supervision as may be prescribed (-) by the Governor General.'

S. 71: 'The native communities shall elect their own chiefs and rulers subject to the approval of the district administration. The Governor General shall safeguard this right against any infringement.

Such communities shall be left free in the management of their domestic affairs, with due regard to the directives issued by the Governor General or by the district administration.

Where [the above] provisions are not in accordance with the institutions of the people or with [other] acquired rights they shall not be applied.' - *Ed.*]

6 The *pitrah,* however, is not distributed according to the religious law, but is (in vulgar Acehnese style) retained by the *töngku* himself, as wages for his services at the religious *trawèh* services during the month of fasting.

7 Its rulers were called *Raja Aceh*; the name of the capital, Kutaraja, referred to the fortified palace, *dalam,* of the sultan.
8 In those days still called Banda Aceh [as it is again called in present-day Indonesia - *Ed.*]
9 In Daya, among other places, one comes across the title *hakim,* nowadays held by adat headmen.
10 *Bila* also means the sacrifice offered for the slain person.
11 Cf. section 728 of N.I. Code of Civil Procedure.
12 In Aceh its duration is calculated in a slightly different manner from that prescribed by Moslem law.
13 [The criterion in adat law being physical maturity rather than age, Van Vollenhoven avoided the Dutch legal distinction between *minderjarig* ('under age', a minor) and *meerderjarig* ('of full age', a major). Instead he used *mondig* and *onmondig,* adopted from old-Dutch law and corresponding to *puberes* and *impuberes* in Roman law (cf. p. 89, above). As these terms have no exact equivalents in English ('mature' and 'immature' not being legal usage), the present translation had to fall back on 'of full age', major(ity), and 'under age', minor(ity) - *Ed.*]
14 [i.e. the authorized expedient in Moslem law permitting a believer in onerous circumstances partially to deviate from the doctrine of the religious ('law') school he belongs to, and to adopt relevant tenets of another school more amenable to his problems. In this case the giving in marriage of girls under age was facilitated by adopting the tenets of the Hanafite School — see Snouck Hurgronje, 1906, Vol. I:344-5. *Ed.*]
15 Lit.: 'guest's gift', i.e. the gift made by, and not to, the groom as a guest in the house of the bride (-).
16 [i.e. under Islamic law: the male agnates — see p. 81. - *Ed.*]
17 [In a meritorious sketch *Kitāb al-qawānīn ash-sharᶜīya,* published in the Malay language at Batavia, reprinted in 1895 - *Ed.*]
18 Turning the assets into money was not traditional usage, other expedients being preferred.
19 This right of occupancy is recognized by ISb. 94*f*/1874.
20 The rice fields consecrated for the benefit of the principal mosque at Kutaraja are called *sara* instead of *wakŏëh.*
21 As in ISb 509/1908, s.1(9); see also p. 64.
22 In the dependencies it was common practice in times of war to move cattle on these terms, for instance from the area of Pasè to Lhōk Sŏmawè.
23 These 'political fines' were abolished for Aceh Major in 1908 [and later for the entire Acehnese area].
24 See ISb 204/1907, promulgating the Amendment of Section 75 of the *Regeringsreglement* of 1854.

CHAPTER VI

1 [Van Vollenhoven here added the archaic Dutch *waardschap,* meaning those regularly eating together. - *Ed.*]
2 [*Padri*: a strict and militant Moslem sect in the first half of the 19th century, whose adherents tried to suppress, by force if necessary, all Minangkabau popular institutions (from cock fighting to matrilineal inheritance) which did not conform to the Prophet's teaching. It was subdued after prolonged hostilities by the Dutch colonial forces in 1838. - *Ed.*]
3 [Cf. Van Vollenhoven's *Adatrecht,* I:108-115, not reproduced here. - *Ed.*]
4 Such as *jaksa* [public prosecutor, head of local police] and *mantri* [minor civil officer].
5 [In a postscript dated July, 1924 — see his *Adatrecht* I:756 — Van Vollen-

hoven accepted the inaccuracy of this analysis after he had read the 'sharply formulated and well documented' article by W. H. A. Sarolea (ITR, 1920, 120-136): '... my misconception of the truth, that it is indeed the descending family branch, *jurai,* which inherits after the death of one of its members, and not the family as a whole (—), and that also the family branch can be a jural community with its own head.' - *Ed.*]

6 [For a valuable analysis of more recent developments in Minangkabau law of inheritance and transactions involving *pancarian* and *pusako* property, see F. von Benda-Beckmann, *Property in Social Continuity,* Nijhoff, The Hague, 1979. - *Ed.*]

CHAPTER VII

1 [*Cultuurstelsel*: the policy of producing crops for the European market (coffee, sugar, indigo, etc.) on the basis of agreements between the government and the indigenous population. Introduced in 1830, the system led to forced labour and other abuses. It was abolished in 1890. - *Ed.*]

2 [H. W. Muntinghe was Secretary-General under Governor-General H. W. Daendels (1807-11) and adviser to T. S. Raffles, the Lieutenant-Governor (1811-6) during the British interregnum. - *Ed.*]

3 [Van Vollenhoven here used the Dutch term *ouderrecht,* see footnote p. 79, above.]

4 [But see Ter Haar, 1948:111 — the transaction there being translated as 'land pledging (pawning)' — who argues that, even if the agreement were to contain such a clause, the effect of it in practice would be that the 'pledgee'-moneylender (who in adat law *never* has the right to demand redemption *of the loan*) after expiry of the stipulated time limit can demand that the *tenancy* ('*pawn*') *relationship* be terminated. If the landowner-borrower then fails to repay the loan the tenant-creditor may proceed, by means of a *new* agreement (or by court action), to secure adat-ownership of the land. - *Ed.*]

5 [Superseded in 1915 by a general Criminal Code applicable to all population groups. - *Ed.*]

6 [The judicial regulations of 1848 prescribed the attendance at government courts in civil and criminal cases involving 'natives', of the chief *penghulu* or similar functionary for Islamic matters, and of two indigenous headmen or suitable substitutes for matters of adat law. - *Ed.*]

CHAPTER VIII

1 *Eindresumé* II (1880):344; Kern, 1912:186; Boekhoudt, 1903.

2 Enthoven, 1912:185; Van der Meulen, 1924:XIII, 5.

3 [The central Representative Assembly of the Indies. Constituted in 1918, initially as a purely advisory body to the colonial government, it comprised a racially mixed membership (including a European chairman appointed by the Crown), which was partly appointed by the Governor-General, and partly elected by regional and local councils. It was given a greater say in the legislative process after the constitutional changes of 1925, but never became a fully-fledged legislature. - *Ed.*]

4 On this topic see e.g. Westenenk, 1918:41; Hamerster, 1914:1451; Willinck, 1909:812; Wilken, 1912, II:188; De Waal van Anckeveen, 1913:6-10.

5 Van Vollenhoven, 1918:172, 322, 350, 417-9, 626, 635, 744; Adriani and Kruyt, 1912(I):399-401; Liefrinck, 1886:1057, 1218; Wilken, 1912(I):58-63, (II): 395; (IV):374. For some illustrations, see AB XXII (1923):447.

6 Hekmeijer, 1904:1037, 1043; Kielstra, 1914:260; AB VII:133*n,* Adriani and Kruyt, 1912, II:343.

7 *Resumé-Ambon,* 1875:23; Kroesen, 1897:276; on this topic generally: Wijnstroom, 1921.

8 This indigenous document has been reproduced (unfortunately not without errors) in AB XVIII:221-35.
9 About processual payments, see e.g.: Ter Haar, 1915; Julien, 1910, I:363-5, II:335; De Haan, 1912, IV:649-50; Korn, 1924:253, 284; Van Vollenhoven, 1918:169, 235, 258, 278, 298, 332, 476, 563, 675, 725.
10 See Van Hasselt, 1882:192; Willinck, 1909:686, 872; AB V:96.
11 See: Willinck, 1909:111, 915-8, 932; AB XII:98-107; Kriebel, 1919:1107; Mallinckrodt, 1925:241; Holleman, 1923:29; Van Vollenhoven, 1918:477.

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* N.B. Abbreviations are listed on pp. XXVIff.; see also 'Works cited', pp. LXVf.
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